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Civilly Committing Criminals: An Analysis of the Expressive Function of Nebraska's "Dangerous Sex Offender" Commitment Procedure

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I. INTRODUCTION

In 2006, the State of Nebraska adopted legislation that authorizes the civil commitment of convicted sex offenders who are "substantially unable to control [their] criminal behavior" and who "suffer[ ] from a mental illness . . . or . . . a personality disorder which makes [them]

likely to engage in repeat acts of sexual violence."[1] This legislation, which has its origins in the "sexually violent predator" commitment statutes of Washington[2] and Kansas,[3] authorizes the continuous, indefinite confinement of sex offenders who have completed their prison terms and who do not meet the state's traditional "mentally ill and dangerous civil commitment standard."[4] Courts reviewing the constitutionality of the Washington and Kansas statutes struggled to categorize these unique commitments as "civil" or "criminal" dispositions and could not agree whether the commitments were predicated upon psychological impairments that justify civil deprivations of liberty. The Supreme Court ultimately resolved these controversial questions in favor of the validity of the Washington and Kansas commitment procedures.[5]

This Article attempts to explain the difficulty that inheres in classifying convicted sex offender commitments as civil or criminal dispositions and argues that the civil commitment of convicted sex offenders can, under certain circumstances, distort the interrelationship between criminal responsibility and psychological impairment that underlies the basic institutions of criminal justice and civil commitment in the United States. The Article is organized as follows: Part II describes the origins, terms, and controversial features of the Kansas and Washington sexual predator commitment statutes and summarizes key legal challenges that have been raised against those statutes. Part III describes the origins and terms of Nebraska's new sex offender commitment act and compares its terms to those of the Washington and Kansas statutes. It should be noted that this Article does not attempt to argue whether the cases addressing the controversial aspects of the Washington and Kansas statutes will apply with equal force to the Nebraska act; rather, it argues only that the Nebraska act, like the Washington and Kansas statutes, raises concerns about the proper functions of criminal punishment and civil commitment. Part IV briefly recounts the test employed by the Supreme Court to distinguish civil deprivations of liberty from criminal deprivations of liberty and outlines an alternate analytical framework that is consistent with the American institutions of civil commitment and criminal punishment. This framework, which is based upon the *expressive function* performed by criminal punishment, is then applied to convicted sex offender commitments, and the manner in which the

1. L.B. 1199, 99th Leg., 2d Sess. § 87(1), 86–91 (Neb. 2006).
2. WASH. REV. CODE ANN. §§ 71.09.010–.902 (West 2002 & West Supp. 2005).
3. KAN. STAT. ANN. §§ 59-29a01 to -29a21 (2005).
4. JUDICIARY COMM., COMMITTEE STATEMENT: L.B. 1199, 99th Leg., 2d Sess., at 3 (Neb. 2006), *available at* http://srvwww.unicam.state.ne.us/unicamAllDrafting.html (search "Search Drafting for" for "LB 1199" in the "99th - Committee Statements" index; then follow link for "Microsoft Word - CS LB1199.doc").
5. *See infra* Part II.

most controversial of these commitments distort the distinction between criminal and civil sanctions is illustrated. Part V concludes the Article.

II. SEXUALLY VIOLENT PREDATOR COMMITMENTS

Historically, states have struggled to determine the appropriate legal institution for dealing with sex offenders.[6] A metaphorical pendulum swung from a preference for criminal punishment to one for civil commitment, and back again to punishment,[7] until the pendulum was, in a sense, thrust in both directions simultaneously with the adoption of the "sexually violent predator" commitment procedure in the State of Washington.[8] The new procedure redefined the sort of psychological impairment that would support a commitment and, in some cases, eliminated the standard commitment statute's requirement that an individual's dangerousness be proved by evidence of a recent overt act.[9] Courts were soon called upon to evaluate the constitutionality of this new procedure, as well as a similar procedure that was adopted in Kansas.[10] Two main areas of concern emerged. First, courts had difficulty determining whether sexually violent predator commitments were actually civil or criminal in nature. Second, the courts struggled to determine whether the statutes' commitment criterion of "mental abnormality or personality disorder" satisfied the substantive due process component of the Fourteenth Amendment. Courts reached different conclusions on each of these issues; indeed, the Supreme Court was required to analyze each issue twice in order to address adequately the lower courts' concerns about the civil or criminal status of the commitments and the substantive nature of psychological impairments that could justify a civil deprivation of liberty.

This Part presents a brief overview of the legal treatment of sex offenders during the past century before proceeding to describe the circumstances that led to the adoption of the sexually violent predator commitment statutes in Washington and Kansas, the terms of the statutes, and courts' analyses of their constitutionality.

A. A Brief Overview of the History of the Legal Treatment of Sex Offenders

Over the course of the last century in the United States, sex offenders have been alternately punished as criminals and committed as

6. *See infra* section II.A.
7. *See generally* Samuel Jan Brakel & James L. Cavanaugh, Jr., *Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States*, 30 N.M. L. REV. 69, 70 (2000).
8. *See infra* section II.B.
9. *See infra* section II.B.
10. *See infra* sections II.B–C.

"psychopaths."[11] Before the 1930s, the criminal law generally treated sex offenders no differently than it treated other criminals, and "[t]he assignation of blame and punishment, typically via criminal conviction and incarceration, was the chief goal" of the legal response.[12] Early in the twentieth century, however, "a new rehabilitation-focused era" began.[13] "Treatment goals" and "indeterminate confinements," as opposed to punishment and offense-specific sentencing, were emphasized.[14] State legislatures, beginning with Michigan's in 1937, began to adopt involuntary civil commitment procedures specifically directed toward sex offenders.[15] Although the particular terms of the commitment statutes varied from state to state,[16] the goal of these statutes, on the whole, was to divert sex offenders from the criminal justice system so that they could be civilly committed instead.[17] These statutes reflected "the general optimism [of the era] about the ability to identify and treat" certain sex offenders.[18] However, this optimism began to fade in the wake of "practical experience and advancing scientific theory," as it became apparent that "sexual psychopaths" could not be reliably identified or effectively treated.[19] At the same time, public opinion turned against the rehabilitative model of criminal justice, and a shift toward a more punitive philosophy occurred.[20] As a result, the number of states with these special sex offender commitment statutes was halved between 1960 and 1990,[21] and those that remained "on the books" were rarely invoked.[22] Thus,

> U.S. jurisprudence regarding sex offenders was close to where it was before the whole sexual psychopath law experiment began: back to undifferentiated, criminal treatment, rejection of special rehabilitative goals or methods for sex offenders, and incarceration of sex offenders in prisons, sometimes under habitual criminal statutes permitting extra-long sentences.[23]

In 1990, however, a legal innovation in the State of Washington gave rise to a new mechanism for incapacitating sex offenders: the sexually violent predator commitment procedure.

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11. *See generally* Brakel & Cavanaugh, *supra* note 7.
12. *Id.* at 70.
13. *Id.*
14. *Id.*
15. John Matthew Fabian, *The Risky Business of Conducting Risk Assessments for Those Already Civilly Committed as Sexually Violent Predators*, 32 WM. MITCHELL L. REV. 81, 88 (2005).
16. *See, e.g.*, Brakel & Cavanaugh, *supra* note 7, at 72 (noting that "pre-conviction" and "post-conviction" models were adopted in various states).
17. Travis D. Weitzel, *The Constitutionality of Quasi-Convictions*, 36 RUTGERS L.J. 1029, 1041 (2005).
18. Brakel & Cavanaugh, *supra* note 7, at 71–72.
19. *Id.* at 73.
20. *Id.*
21. *See* Fabian, *supra* note 15, at 89.
22. Brakel & Cavanaugh, *supra* note 7, at 74.
23. *Id.*

B. The Washington Sexually Violent Predator Commitment Procedure

On May 20, 1989, Earl Shriner raped, choked, and mutilated a seven-year-old boy from South Tacoma, Washington, and left him for dead.[24] Shriner, whose IQ was reportedly "equal or inferior to [that of] a child between 8 and 12 years old,"[25] had a criminal history dating to 1965.[26] In 1977, Shriner pleaded guilty to charges stemming from assaults upon two sixteen-year-old hitchhikers, and he was sentenced to ten years' imprisonment.[27] Just prior to his release, "diaries and drawings . . . in which he described his intent to rape, torture and kill children using cages, shackles, ammonia, razor blades and a farm tool intended for castrating bulls" were found in his cell.[28] An attempt to have Shriner civilly committed failed; thus, despite the indications of his intent to reoffend, he was freed when he completed his prison term.[29] It did not take him long to reoffend after his release; indeed, Shriner was convicted in two separate cases before the brutal assault of May 20, 1989.[30]

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24. Kate Shatzkin, *Shriner Guilty: Jury Convicts Him in Attack on Boy*, SEATTLE TIMES, Feb. 7, 1990, at A1. The boy's life was saved when he was found wandering, naked and with a noose wrapped around his neck, in a wooded area near his home. *Id.*; *System Fails to Halt Sex Offender*, TIMES-PICAYUNE, May 24, 1989, at A6. A detailed description of the crime and the media and public's response to it may be found in David Boerner, *Confronting Violence: In the Act and in the Word*, 15 U. PUGET SOUND L. REV. 525, 525–38 (1992).
25. Editorial, *Shriner's Threat is Finally Shackled*, SEATTLE POST-INTELLIGENCER, Mar. 28, 1990, at A6.
26. *See, e.g.*, *System Fails to Halt Sex Offender*, *supra* note 24. According to media reports, Shriner "was declared a 'defective delinquent' after choking a 7-year-old girl" in 1965. *Id.* Shortly thereafter, he killed a fifteen-year-old girl. *Id.* Since Shriner's youth prevented the state from filing homicide charges against him, he was sent to a reform school. *Id.*; Shatzkin, *supra* note 24. After officials at the reform school decided that Shriner was "too dangerous," he was committed to Western State Hospital from 1968 to 1973. *System Fails to Halt Sex Offender*, *supra* note 24.
27. *System Fails to Halt Sex Offender*, *supra* note 24. It was reported that Shriner was ordered to be "committed to the sexual psychopath program at Eastern State Hospital, but officials there refused to accept him." *Id.* As a result, he served his term of incarceration at the Shelton Correctional Center. *Id.*
28. David Foster, *Many Favor Tougher Policy on Sex Offenders: Mutilation Case Fuels Outrage, Questions About Rehabilitation*, AKRON BEACON J., Feb. 18, 1990, at A11.
29. *Id.*; Boerner, *supra* note 24, at 542–43 ("[T]he civil commitment system was not designed for cases such as Earl Shriner's and . . . the dismissal [of the civil commitment proceeding against Shriner] was an accurate application of the intent of the legislature.").
30. Foster, *supra* note 28 ("In August 1987, Shriner stabbed a boy in Tacoma; he served 66 days for attempted assault. In January 1988, he tied a 10-year-old boy to a fence post and beat him. Prosecutors dropped a charge of attempted rape, Shriner pleaded guilty to attempted unlawful imprisonment and, after barely two months in prison, he was freed that December.")

Shriner's attack upon the South Tacoma boy, which alone was sufficient to "provoke[ ] outrage throughout the state,"[31] was followed closely in time by a series of offenses against other children living in the area.[32] In response to the public's demand for action, Washington Governor Booth Gardner established the Governor's Task Force on Community Protection.[33] As stated by its chairman,[34] the task force's mission was "to respond in a meaningful and responsible way to the public outrage over . . . cases in which violent sex offenders were released to the community only to reoffend."[35] The task force submitted a set of recommendations to the legislature,[36] and many of these recommendations were incorporated into the Community Protection Act of 1990.[37] The Act, which passed without a dissenting vote,[38] increased the length of sentences for sex offenses[39] and implemented the nation's first modern community notification law targeting sex offenders.[40]

The Act also established a new civil commitment procedure for certain sex offenders.[41] Specifically, the procedure was designed to facili-

31. Shatzkin, *supra* note 24.
32. Daniel M. Filler, *Silence and the Racial Dimension of Megan's Law,* 89 IOWA L. REV. 1535, 1542 (2004) ("In September 1989, two brothers, William and Cole Neer—ages ten and eleven—were murdered in suburban Vancouver, Washington. A few weeks later, four-year-old Lee Joseph Islei was abducted from a schoolyard, raped and killed. Two weeks after that, Westley Dodd was arrested after abducting a six-year-old boy from a movie theater restroom. Dodd was subsequently charged with both the Neer and the Islei murders." (footnotes omitted)). Shriner's offense was also preceded by the abduction, rape, and murder of Diane Ballasiotes in Seattle. J. Christopher Rideout, *So What's in a Name? A Rhetorical Reading of Washington's Sexually Violent Predators Act*, 15 U. PUGET SOUND L. REV. 781, 784 (1992) (citing Dave Birkland, *Jailed Man a Suspect in Slaying*, SEATTLE TIMES, Oct. 4, 1988, at B1).
33. *See* Rideout, *supra* note 32, at 786–87; *see also id.* at 787 n.24 (citing Exec. Order No. 89-04, Wash. Reg. 89-13-055 (1989)). Members of the task force included the mothers of Dianne Ballasiotes and Earl Shriner's last victim, *id.* at 787 n.24, who had become vocal advocates for legal reforms, *see* Kate Shatzkin, *Shriner Case Skirts More Deadly Turf: Home*, SEATTLE TIMES, Feb. 21, 1990, at H1; Filler, *supra* note 32, at 1542–43.
34. Boerner, *supra* note 24, at 538 & n.3.
35. Norm Maleng, *The Community Protection Act and the Sexually Violent Predators Statute*, 15 U. PUGET SOUND L. REV. 821, 821 (1992).
36. *Id.* at 822.
37. *See id.*; Community Protection Act, ch. 3, 1990 Wash. Sess. Laws 13.
38. Maleng, *supra* note 35, at 822.
39. Foster, *supra* note 28; *see also* Community Protection Act, ch. 3, §§ 701–708, 901–904, 1990 Wash. Sess. Laws 13, 70–91, 96–97 (outlining sentences for sex offenses and provisions for enhancing those sentences).
40. Filler, *supra* note 32, at 1543; *see also* Community Protection Act, ch. 3, §§ 101–131, 401–409, 1990 Wash. Sess. Laws 13, 13–16, 49–53 (containing the community notification and sex offender registration provisions).
41. Boerner, *supra* note 24, at 540; *see also* Foster, *supra* note 28 (civil commitment procedure would allow state to "hold incorrigible offenders indefinitely"); Commu-

tate the involuntary commitment of persons who belong to "a small but extremely dangerous group of *sexually violent predators*" who are not amenable to commitment under the state's standard procedure.[42] "Sexually violent predators" are defined as persons who have been "convicted of or charged with a crime of sexual violence and who suffer[ ] from a mental abnormality or personality disorder which makes [them] likely to engage in predatory acts of sexual violence if not confined in a secure facility."[43] According to Washington's legislature, these persons are not eligible for commitment under the standard civil commitment procedure for two reasons. First, the legislature concluded that the mental abnormalities or personality disorders afflicting sexually violent predators do not amount to "mental disease[s] or defect[s] that render[ ] [the predators] appropriate for the existing involuntary treatment act."[44] Second, the legislature noted that sexually violent predators serving prison terms "do not have access to potential victims," which frustrates the state's ability to prove that these predators have committed "recent overt acts"—a prerequisite to commitment under the standard civil commitment statute.[45] In short, the sexually violent predator commitment procedure was meant to close perceived loopholes in the state's standard involuntary civil commitment procedure—loopholes that allowed people such as Earl Shriner

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nity Protection Act, ch. 3, §§ 1001–1013, 1990 Wash. Sess. Laws 13, 97–102 (codified as amended in scattered sections of WASH. REV. CODE ANN. § 71.09).

42. WASH. REV. CODE ANN. § 71.09.010 (West 2002) (emphasis added). The standard commitment procedure appears at WASH. REV. CODE ANN. §§ 71.05.10–.940 (West 2002 & West Supp. 2005).

43. WASH. REV. CODE ANN. § 71.09.020(16) (West Supp. 2005). "'Mental abnormality' means a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others." *Id.* § 71.09.020(8). The term "personality disorder" is not defined specifically in the statute; however, the Washington Supreme Court interpreted the term in a manner consistent with its use in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*. *See In re* Young, 857 P.2d 989, 1002–03 (Wash. 1993), *superseded by statute*, WASH. REV. CODE ANN. § 71.09.020 (West Supp. 2005).

44. WASH. REV. CODE ANN. § 71.09.010 (West 2002). *See also id.* ("The legislature further finds that the prognosis for curing sexually violent predators is poor, the treatment needs of this population are very long term, and the treatment modalities for this population are very different than the traditional treatment modalities for people appropriate for commitment under the involuntary treatment act.").

45. *Id. See also* WASH. REV. CODE ANN. § 71.05.020(19) (West 2002) (current version at WASH. REV. CODE § 71.05.020(21) (2006)) (defining "[l]ikelihood of serious harm" under the involuntary treatment act); *In re* Harris, 654 P.2d 109, 113 (Wash. 1982) ("We . . . interpret RCW 71.05.020 as requiring a showing of a substantial risk of physical harm as evidenced by a recent overt act."). *But see In re* Pugh, 845 P.2d 1034, 1038–39 (Wash. Ct. App. 1993) (holding that overt act requirement was satisfied despite Pugh's confinement).

to avoid commitment—by redefining the sort of psychological impairment that would support a commitment and eliminating the "recent overt act" requirement.

In Washington, the procedure for committing a sexually violent predator begins with the filing of "a petition alleging that the person is a 'sexually violent predator' and stating sufficient facts to support such allegation."[46] This petition may be filed whenever it appears that a person may be a "sexually violent predator," as that term is defined above,[47] and any of the following circumstances exist: (1) the person was previously convicted of a "sexually violent offense"[48] and is due to be released from confinement; (2) the person committed a "sexually violent offense" as a juvenile and is due to be released from confinement; (3) the person was charged with a "sexually violent offense," but was found to be incompetent to stand trial; (4) the person was found not guilty of a "sexually violent offense" by reason of insanity; or (5) the person was convicted of a "sexually violent offense," has been released, and has committed a "recent overt act."[49] After the petition is filed, a judge must determine whether there is probable cause to believe that the person is, in fact, a sexually violent predator.[50] If the judge finds that probable cause exists, the person is taken into custody until a probable cause hearing may be held.[51] If, at the conclusion of this hearing, the court finds that there is probable cause to believe that the person is a sexually violent predator, the person must be transferred to "an appropriate facility for an evaluation as to whether the person is a sexually violent predator."[52] The court must then hold a trial to determine whether, beyond a reasonable doubt,[53] the person is a sexually violent predator.[54] The person, the government, or the

46. WASH. REV. CODE ANN. § 71.09.030 (West 2002). The petition may be filed by "the prosecuting attorney of the county where the person was convicted or charged [with a 'sexually violent offense,'] or the attorney general if requested by the prosecuting attorney." *Id.*

47. *See supra* note 43 and accompanying text.

48. *See* WASH. REV. CODE ANN. § 71.09.020(15) (West Supp. 2005). "Sexually violent offenses" are enumerated in the statute and include rapes and certain other offenses that are found to be "sexually motivated" beyond a reasonable doubt. *Id.*

49. *See id.* § 71.09.030. A "recent overt act" is defined as "any act or threat that has either caused harm of a sexually violent nature or creates a reasonable apprehension of such harm in the mind of an objective person who knows of the history and mental condition of the person engaging in the act." *Id.* § 71.09.020(10).

50. *Id.* § 71.09.040(1).

51. *Id.* § 71.09.040(1)–(2). The probable cause hearing must occur within seventy-two hours after the person is taken into custody. *Id.* § 71.09.040(2).

52. *Id.* § 71.09.040(4).

53. *Id.* § 71.09.060(1).

54. *Id.* § 71.09.050(1). The trial must be held within forty-five days of the completion of the probable cause hearing, absent continuances which may be granted upon a showing of good cause or upon the court's own motion. *Id.*

court may demand that the trial be held before a twelve-person jury,[55] and if the determination is made by a jury, its verdict must be unanimous.[56] At the conclusion of the trial, if the court or jury determines that the person is a sexually violent predator, the person is "committed to the custody of the department of social and health services for placement in a secure facility . . . for control, care, and treatment."[57] The person must then remain in custody until his or her condition "has so changed that the person no longer meets the definition of a sexually violent predator," or until it is appropriate to release the person conditionally "to a less restrictive alternative."[58]

Washington's sexually violent predator commitment procedure was soon challenged by two men, Andre Brigham Young and Vance Russell Cunningham, who were "civilly committed under its authority" after serving prison terms for rape.[59] Their challenge provided the Washington Supreme Court with its first opportunity to determine the legality of the new procedure, and a number of their key arguments were ultimately presented to the federal courts as well. The state and federal courts' disposition of their arguments will be summarized below.

1. In re Young: *The Washington Supreme Court Considers the Constitutionality of Sexually Violent Predator Commitments*

In support of their challenge to the Washington sexually violent predator commitment procedure, the defendants[60] submitted two

55. *Id.* § 71.09.050(3).

56. *Id.* § 71.09.060(1). It should be noted that the person will not be released from confinement unless the jury decides unanimously that he or she is *not* a sexually violent predator. *See id.* "If the jury is unable to reach a unanimous verdict, the court shall declare a mistrial and set a retrial within forty-five days of the date of the mistrial unless the prosecuting agency . . . moves to dismiss the petition." *Id.*

57. *Id.*

58. *Id.* Persons who have been committed are reviewed on at least an annual basis to determine whether they "currently meet[] the definition of a sexually violent predator and whether conditional release to a less restrictive alternative is in the best interest of the person and conditions can be imposed that would adequately protect the community." *Id.* § 71.09.070. *See also id.* §§ 71.09.090–.098 (outlining the procedure for conditional release to less restrictive alternative).

59. *See In re* Young, 857 P.2d 989, 992, 994–96 (Wash. 1993), *superseded by statute*, WASH. REV. CODE ANN. § 71.09.020 (West Supp. 2005). A petition alleging that Young was a sexual predator was filed one day prior to his release from prison, and a similar petition was filed against Cunningham approximately four and one-half months after he completed a prison term. *Id.* at 994–95.

60. It is imprecise to refer to Young and Cunningham as "defendants" because their direct appeals from their commitments were consolidated with personal restraint petitions (filed by Young and Cunningham) and resolved in a single opinion. *See id.* at 996. Nevertheless, in the interests of clarity and consistency this Article adopts the convention of referring to persons who were convicted of sex offenses

main arguments to the Washington Supreme Court: First, they argued that the commitment procedure violated both the Ex Post Facto[61] and Double Jeopardy Clauses,[62] and was therefore unconstitutional.[63] Second, they argued that their commitments did not comport with constitutional principles of "substantive due process."[64] The Washington Supreme Court's analysis of each argument will be discussed in turn.[65]

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and alleged to be "sexually violent predators" as "defendants." Though this convention results in a sacrifice of precision, it eliminates the distraction that sometimes accompanies the imposition of labels which vary based solely upon the procedural posture of a particular case.

61. *See* U.S. CONST. art I, § 10; *see also In re Young*, 857 P.2d at 999 ("A law violates the ex post facto prohibition if it aggravates a crime or makes it greater than it was when committed; permits imposition of a different or more severe punishment than was permissible when the crime was committed; or, changes the legal rules to permit less or different testimony to convict the offender than was required when the crime was committed." (quoting State v. Edwards, 701 P.2d 508, 512 (Wash. 1985))).

62. *See* U.S. CONST. amend. V. "The double jeopardy clause prohibits multiple punishment for the same offense." *In re Young*, 857 P.2d at 999 (citing United States v. Halper, 490 U.S. 435, 440 (1989)).

63. *In re Young*, 857 P.2d at 996.

64. Young v. Weston, 898 F. Supp. 744, 748 (W.D. Wash. 1995) ("The Due Process Clause protects individuals on both procedural and substantive levels. Substantive due process 'prevents the government from engaging in conduct that "shocks the conscience," or interferes with rights "implicit in the concept of ordered liberty."' This substantive component of the Due Process Clause 'bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them."'" (citations omitted)); *see also In re Young*, 857 P.2d at 1000 (describing the defendants' substantive due process arguments).

65. The defendants also argued that the commitment procedure suffered from the following five procedural infirmities: (1) "the ex parte finding of probable cause denies meaningful predeprivation due process"; (2) "consideration of less restrictive alternatives to confinement is necessary"; (3) "the burden of proof at trial is inadequate because the jury need not be unanimous"; (4) "the Statute is void for vagueness"; and (5) "petitioners were unconstitutionally denied a right to remain silent." *In re Young*, 857 P.2d at 1009. In addition, the defendants raised a number of evidentiary issues. *See id.* at 1015–18. A detailed review of these arguments and the court's resolution of them is not necessary for the purposes of this Article. Ultimately, Young's predator determination was affirmed, but his case was remanded "solely for a consideration of less restrictive alternatives." *Id.* at 1018. This holding prompted the legislature to amend the statute to provide for limited consideration of less restrictive alternatives to commitment in a secure facility, which in turn spawned additional equal protection challenges from committed predators. *See In re* Thorell, 72 P.3d 708, 720–21 (Wash. 2003). Cunningham's commitment was reversed for reasons that will be explained below.

a. Ex Post Facto and Double Jeopardy Challenges: The Washington Supreme Court Determines that the Sexually Violent Predator Commitment Statute is "Civil" in Nature

Young and Cunningham claimed that their commitments as sexually violent predators violated the Constitution's Ex Post Facto and Double Jeopardy Clauses.[66] Since the ex post facto and double jeopardy prohibitions generally apply only to criminal matters,[67] the Supreme Court of Washington observed that the defendants' arguments must be rejected if the sexual predator commitment procedure is civil in nature.[68] Therefore, the court applied the two-part analysis set forth in *United States v. Ward*[69] to determine whether the procedure is truly civil or criminal.

The first step of the *Ward* analysis requires a court to consider whether the language of the statute and its legislative history indicate a preference for a "civil" or "criminal" label.[70] In *In re Young*, the Washington Supreme Court readily concluded that "the Legislature intended a civil statutory scheme" when it created the sexually violent predator commitment statute.[71] Specifically, the court noted that "[t]he section of the law as enacted by the Legislature is entitled 'Civil Commitment'"; that the statute compared itself to the "civil involuntary commitment act"; that the statute gave "no role in caring for committed sex predators" to the Department of Corrections; and that the legislature's final report and the task force's report refer to the commitment procedure as a civil law.[72]

The court then proceeded to the second step of the *Ward* analysis, which required it to consider whether "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' that the proceeding be civil."[73] To resolve this inquiry, the court applied the "guidance for the determination of whether a statute is criminal" outlined by the Supreme Court in *Kennedy v. Mendoza-Martinez*;[74] that is, the court considered

66. *In re Young*, 857 P.2d at 996.
67. *See id.* at 999 ("The ex post facto clause has been interpreted to apply only to criminal matters." (citing, inter alia, Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798))); *id.* ("Double jeopardy does not apply 'unless the sanction sought to be imposed in the second proceeding is punitive in nature so that the proceeding is essentially criminal.'" (quoting O'Day v. King County, 749 P.2d 142, 153 (Wash. 1988))).
68. *See id.* at 996.
69. 448 U.S. 242, 248–49 (1980).
70. *In re Young*, 857 P.2d at 996.
71. *Id.* at 997.
72. *Id.* at 996–97.
73. *Id.* at 997 (quoting Allen v. Illinois, 478 U.S. 364, 369 (1986)).
74. 372 U.S. 144, 168–69 (1963).

> [w]hether the [commitment procedure] involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment (retribution and deterrence), whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.[75]

The court found that "[t]hese factors weigh heavily on the side of finding that [the sexual predator commitment] Statute is civil," stating,

> Although the scheme here does involve an affirmative restraint, the civil commitment goals of incapacitation and treatment are distinct from punishment, and have been so regarded historically. Moreover, no finding of scienter is required to commit an individual who is a sexually violent predator; the determination is made based on a mental abnormality or personality disorder rather than on one's culpability. Furthermore, the Statute is necessary to serve the legitimate and vital purpose of protecting innocent potential victims.[76]

After reemphasizing that the statute promoted the civil purposes of incapacitation and treatment, as opposed to the punitive goals of retribution and deterrence, the court concluded that the statute was indeed "civil" in nature.[77] Given this conclusion, the court held that the defendants' ex post facto and double jeopardy challenges necessarily failed.[78]

b. The Washington Supreme Court Concludes that Sexually Violent Predator Commitments Comport with Principles of Substantive Due Process

The defendants also raised four "substantive due process"[79] challenges against the sexually violent predator commitment procedure.[80] The court's analysis of each of these challenges is summarized below.

First, citing *Addington v. Texas*[81] and *Foucha v. Louisiana*,[82] Young and Cunningham claimed that the commitment procedure "allows the State to hold individuals without proving that [they are] both mentally ill and dangerous" in violation of those two cases.[83] The Washington Supreme Court rejected the argument that the statute permits commitments without a showing of "mental illness," noting that the terms "mental abnormality or personality disorder" set forth in the statute "incorporate[ ] a number of recognized mental patholo-

75. *In re Young*, 857 P.2d at 997–98 (quoting *Kennedy*, 372 U.S. at 168–69).
76. *Id.* at 998.
77. *Id.* at 998–99.
78. *Id.* at 999–1000.
79. *See supra* note 64.
80. *In re Young*, 857 P.2d at 1000.
81. 441 U.S. 418 (1979).
82. 504 U.S. 71 (1992).
83. *In re Young*, 857 P.2d at 1001.

gies" that are "nearly identical to the notion of 'mental disorder' as defined in the [American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM)]."[84] However, the court also suggested that as long as "psychiatric and psychological clinicians who testify in good faith as to mental abnormality are able to identify sexual pathologies that are as real and meaningful as other pathologies already listed in the DSM," a commitment may be based upon a "mental pathology" that does not amount to a recognized "mental disorder."[85] In that vein, the court observed that in each of the defendants' specific cases, the state's experts diagnosed "paraphilia not otherwise specified," a broad "residual category in the *DSM-III-R* which encompasses both less commonly encountered paraphilias and those not yet sufficiently described to merit formal inclusion in the *DSM-III-R*."[86] The court then concluded that the defendants' past sex offenses provided a basis for their residual diagnoses:

> The expert testimony further reflected that both [defendants] Young and Cunningham could be classified within the "paraphilia not otherwise specified" category as suffering from "rape as paraphilia". [sic] According to the seminal article on this mental disorder, portions of which were read into testimony at both trials, certain patterns of rape fall into this diagnosis:
>
> "Clinical interviews of rapists . . . provide support for the classification of rape as a paraphilia, because many individuals report having recurrent, repetitive, and compulsive urges and fantasies to commit rapes. These offenders attempt to control their urges, but the urges eventually become so strong that they act upon them, commit rapes, and then feel guilty afterwards with a temporary reduction of urges, only to have the cycle repeat again. This cycle . . . is similar to the clinical picture presented by exhibitionists, voyeurs, pedophiles, and other traditionally recognized categories of paraphiliacs."[87]

The court also noted that there was evidence that Young "suffered from an 'anti-social personality disorder,'" which "is classified as a mental disorder in the *DSM-III-R*."[88] Thus, since the evidence supported findings that each defendant suffered from classifiable mental disorders, the court rejected the defendants' claim that they were committed in the absence of proof that they suffered from "mental illness."[89] The court also rejected the defendants' argument that the sexual predator statute permits commitments without proof "that [a] person is dangerous to the community," because "the statute requires

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84. *Id.*

85. *Id.* (emphasis omitted) (quoting Alexander D. Brooks, *The Constitutionality and Morality of Civilly Committing Violent Sexual Predators*, 15 U. PUGET SOUND L. REV. 709, 733 (1992)).

86. *Id.* at 1002.

87. *Id.* (quoting Gene G. Abel & Joanne-L. Rouleau, *The Nature and Extent of Sexual Assault*, *in* HANDBOOK OF SEXUAL ASSAULT: ISSUES, THEORIES, AND TREATMENT OF THE OFFENDER 9, 18 (W.L. Marshall et al. eds., 1990)).

88. *Id.* "Anti-social personality disorder is characterized by a long-term pattern of irresponsible and anti-social behavior." *Id.* at 1003.

89. *Id.* at 1004.

proof beyond a reasonable doubt that [a] person . . . suffers from a mental abnormality or personality disorder 'which makes the person likely to engage in predatory acts of sexual violence.'"[90]

The defendants' second substantive due process argument was based on a claim that "the nature and duration of commitment [do not] bear some reasonable relation to the purpose for which the individual is committed."[91] The court rejected this argument readily, noting that the statute serves the purposes of "treatment and incapacitation" and that the defendants' dangerousness "justifies [their assignment to] a secure confinement facility."[92]

Third, and relatedly, the defendants asserted that the commitment procedure amounted to "unconstitutional preventive detention."[93] However, the court concluded that since the procedure "is narrowly tailored to serve a compelling state interest"; since no commitments can occur absent proof "that the individual is mentally ill and dangerous"; and since the state bears the burden to prove, beyond a reasonable doubt, that the person is suffering from a mental disorder and is dangerous, the procedure is constitutional.[94] The court also noted that "the Statute's release provisions provide the opportunity for periodic review of the committed individual's current mental condition and continuing dangerousness to the community."[95]

Finally, the defendants argued that the sexual predator commitment procedure violated Washington's constitutional requirement of "evidence of a recent overt act to prove dangerousness."[96] The court concluded that, "where an individual has been released from confinement on a sex offense . . . and lives in the community immediately prior to the initiation of sex predator proceedings," "proof of a recent overt act is necessary to satisfy due process concerns."[97] However, the court found that if a sexually violent predator has been incarcerated prior to commitment, "a requirement of a recent overt act under the Statute would create a standard which would be impossible to meet."[98] Reasoning that "due process does not require that the absurd be done before a compelling state interest can be vindicated,"[99] and recognizing that "the Legislature expressly noted that the [standard] involuntary commitment statute was an inadequate remedy because

90. *Id.* at 1003–04 & n.9 (quoting WASH. REV. CODE ANN. § 71.09.020(1) (West 1992) (current version at WASH. REV. CODE ANN. § 71.09.020(16) (West Supp. 2005))).
91. *Id.* at 1004 (quoting Jones v. United States, 463 U.S. 354, 368 (1983)).
92. *Id.* at 1004–05.
93. *Id.* at 1005 (citing Foucha v. Louisiana, 504 U.S. 71 (1992)).
94. *Id.* at 1005–08 (footnote omitted).
95. *Id.* at 1008.
96. *Id.*
97. *Id.* at 1009 (citation omitted).
98. *Id.* at 1008.
99. *Id.* at 1008 (quoting People v. Martin, 165 Cal. Rptr. 773, 780 (Ct. App. 1980)).

confinement prevented any overt act,"[100] the court held that when individuals are incarcerated when sexual predator commitment proceedings are initiated, "no evidence of a recent overt act is required."[101] Since Cunningham had been released from prison and had lived in the community for approximately four and one-half months before the sexual predator petition was filed against him, and since there was no evidence or allegation that Cunningham committed a recent overt act, the court reversed his commitment.[102] Young, however, was incarcerated at the time of the filing of the petition;[103] therefore, his commitment remained valid despite the absence of evidence of a recent overt act.[104]

2. Young v. Weston: *The United States District Court for the Western District of Washington Rejects the Washington Supreme Court's Analysis of the Constitutionality of the Sexually Violent Predator Commitment Procedure*

After failing to obtain relief from the Washington Supreme Court, Young filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Washington.[105] The court's analysis of the petition focused on three of the arguments that Young presented to the Washington Supreme Court; specifically, the court considered whether the sexual predator commitment statute violated the Ex Post Facto Clause, the Double Jeopardy Clause, and the Fourteenth Amendment's substantive due process component.[106]

a. *Ex Post Facto and Double Jeopardy Challenges: The District Court Determines that the Sexually Violent Predator Commitment Statute is "Criminal" in Nature*

The district court began its analysis of Young's ex post facto challenge by studying the sexually violent predator commitment statute to determine whether it was truly civil or criminal in nature.[107] In doing so, the court considered the same factors that the Washington Supreme Court applied when it determined that the statute was civil in

100. *Id.* at 1009 (citation omitted).
101. *Id.*
102. *Id.* Cunningham's commitment was also reversed on the ground that the jury's verdict was not unanimous. *Id.* at 1012.
103. The petition was filed one day before Young's release from prison following his most recent rape conviction. *Id.* at 994.
104. *Id.* at 1018. Young's case was remanded "solely for a consideration of less restrictive alternatives." *Id.*
105. Young v. Weston, 898 F. Supp. 744, 745 (W.D. Wash. 1995).
106. *Id.* at 748.
107. *Id.* at 751–53.

nature;[108] however, the district court reached the opposite result.[109] First, the court noted that "there is no dispute that [the] Statute subjects individuals to an affirmative restraint."[110] Second, it observed that "the Statute applies to behavior that is already criminal,"[111] stating, "Indeed, [the statute] is expressly limited in its application to persons who have been convicted of a crime or who have been charged with a crime but found incompetent to stand trial or found not guilty by reason of insanity."[112] Third, and in stark contrast to the Washington Supreme Court,[113] the court found that "the Statute, in its operation, will promote the traditional aims of punishment—retribution and deterrence."[114] In support of this finding, the court noted that the statute "requires that the convicted sex offender serve his sentence prior to commitment," "forecloses the possibility that offenders will be evaluated and treated until after they have been punished," and thereby delays treatment, which "strongly suggests that treatment is of secondary, rather than primary, concern."[115] Because the court found that the statute was truly criminal in nature, and because it was applied to Young retrospectively and to his disadvantage, the court held that Young's commitment violated the Ex Post Facto Clause of the Constitution.[116] In addition, the court held that since the statute "serves the traditional aims of punishment—retribution and deterrence," and since Young had already been punished for committing a sexually violent offense, his incarceration as a sexually violent predator amounted to a second punishment in violation of the Double Jeopardy Clause.[117]

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108. *Compare Young*, 898 F. Supp. at 751–53, *with In re Young*, 857 P.2d at 996–98. To refresh, the district court cited the two-step procedure outlined in *United States v. Ward*, 448 U.S. 242, 248 (1980), and considered the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). *Young*, 898 F. Supp. at 751–52. Those factors are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose.

Id. at 752 (internal quotation marks omitted) (quoting *Kennedy*, 372 U.S. at 168–69).

109. *Id.* at 752–53.
110. *Id.* at 752.
111. *Id.*
112. *Id.*
113. *See In re Young*, 857 P.2d at 998–99.
114. *Young*, 898 F. Supp. at 752.
115. *Id.* at 752–53.
116. *Id.* at 753.
117. *Id.* at 753–54.

b. The District Court Concludes that Sexually Violent Predator Commitments Do Not Comport with Principles of Substantive Due Process

In addressing the defendant's substantive due process argument, the court noted that "freedom from bodily restraint" is "[a]t the heart of the liberty interests protected from arbitrary government actions,"[118] and that "[a]bsent clear and convincing evidence of both mental illness and dangerousness," the detention of the mentally ill is impermissible.[119] The court then rejected the state's argument (and, at least implicitly, the Washington Supreme Court's holding) that the statute satisfied this standard, finding instead that the "mental illness" requirement was not met and that the statute "permits indefinite incarceration based on little more than a showing of potential future dangerousness."[120] In support of this holding, the court looked first to the language of the statute and observed that "the legislature's findings expressly disavow the notion that the targeted group of persons are [sic] mentally ill."[121] Instead, "the target group is made up of individuals 'who do not have a mental disease or defect that renders them appropriate for the existing involuntary treatment act.'"[122] The court also studied the statutory terms "mental abnormality" and "personality disorder" and concluded that neither was sufficient to satisfy the mental illness requirement.[123] The term "mental abnormality," the court noted, "has neither a clinically significant meaning nor a recognized diagnostic use among treatment professionals."[124] In addition, the court found that "[t]he choice of [the term] 'mental abnormality,' as opposed to 'mental illness' or 'mental disorder,'" was a deliberate decision indicating "that the State did not intend the Statute to capture only the seriously mentally ill."[125] The court also found that the definition of the term "mental abnormality" provided in the statute—"a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts in a degree constituting such person a menace to the health and safety of others"—"establishes an unacceptable tautology: a sexually violent predator suffers from a mental condition that predisposes him or her to commit acts of sexual

118. *Id.* at 748 (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)).
119. *Id.* at 749 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Jones v. United States, 463 U.S. 354, 368 (1983); O'Connor v. Donaldson, 422 U.S. 563 (1975)).
120. *Id.*
121. *Id.*
122. *Id.* (quoting WASH. REV. CODE ANN. § 71.09.010 (West 1992) (current version at WASH. REV. CODE ANN. § 71.09.010 (West 2002))).
123. *Id.* at 749–50.
124. *Id.* at 750.
125. *Id.* at 750 n.2.

violence."[126] The court noted that the term "personality disorder" suffered from this same tautology: "the only observed characteristic of the disorder is the predisposition to commit sex crimes."[127]

After completing its review of the statutory language, the court then turned to the legislative history of the sexual predator commitment statute and concluded that "[t]he Governor's Task Force on Community Protection . . . plainly intended to craft legislation to permit the involuntary commitment of persons who are not mentally ill."[128] In support of this conclusion, the court quoted the following language from the task force's final report:

> Civil commitment under the involuntary treatment law allows indefinite commitment, but is quite restrictive in its definitions. Under current laws, sexually violent predators only qualify for civil detention when a mental illness or mental disorder is present. The Task Force examined the histories of some individual violent predators who had been judged not to have a mental illness or mental disorder and therefore were not detainable.[129]

The court also noted,

> Indeed, in testimony before the legislature, one member of the Task Force explained that Washington's traditional civil commitment law, Wash. Rev. Code § 71.05, *et seq.*, was inappropriate for Earl Shriner, the perpetrator of the highly publicized assault and mutilation of a young boy, because he was not mentally ill. SENATE LAW & JUSTICE COMMITTEE, Testimony of Professor David Boerner at 1 (Jan. 10, 1990). In describing Earl Shriner, Professor Boerner stated "Mr. Shriner is not mentally ill as that term is defined. He is clearly a problem, and clearly very dangerous, but he doesn't suffer from a classic mental illness."[130]

Based upon its review of the statutory language and legislative history, the court held that "the Sexually Violent Predator Statute, allowing as it does the indefinite confinement of persons who are not mentally ill, violates the substantive protections of the Due Process Clause."[131]

Since the district court concluded that the sexually violent predator statute "violate[d] the substantive due process component of the Fourteenth Amendment, the Ex Post Facto Clause, and the Double Jeopardy Clause," the court granted Young's petition for a writ of habeas corpus.[132] It also placed the sexually violent predator commitment statute into an unusual state of legal tension: though the statute had been held constitutional by the state supreme court, a federal district court with jurisdiction in the state found it to be unconsti-

126. *Id.* at 750 (quoting WASH. REV. CODE ANN. § 71.09.020(2) (West 1992) (current version at WASH. REV. CODE ANN. § 71.09.020(8) (West Supp. 2005))).
127. *Id.*
128. *Id.*
129. *Id.* (quoting TASK FORCE ON CMTY. PROTECTION, FINAL REPORT TO BOOTH GARDNER, GOVERNOR, STATE OF WASHINGTON, II-21 (1989)).
130. *Id.* at 750 n.3.
131. *Id.* at 751.
132. *Id.* at 754.

tutional. This tension lasted until the United States Supreme Court was presented with an opportunity to consider a similar statute that was enacted in Kansas, as discussed below.

C. The Kansas Sexually Violent Predator Act

On July 1, 1993, Stephanie Schmidt, a nineteen-year-old university student, disappeared after accepting a ride home from Donald Gideon, a coworker at a Pittsburg, Kansas, restaurant.[133] Four weeks later, Gideon confessed to police that he had sexually assaulted and murdered Stephanie.[134] At the time of the murder, Gideon was on supervised release after serving ten years of a twenty-year maximum sentence for a 1983 rape conviction.[135] However, neither Stephanie nor her employer knew about the conviction because probation and parole officials were not required to disclose Gideon's criminal record.[136]

Stephanie's parents, Gene and Peggy Schmidt, began a concerted effort to reform Kansas law relating to sex offenders.[137] They formed a task force that quickly proposed a package of legislation, including an "Employer Notification" bill that would require parole officers to notify employers of violent felons' offense histories; an enhanced set of sentencing guidelines; and a "sexually violent predator" civil commitment procedure modeled after Washington's.[138] Indeed, the Washington statute, which had recently been upheld by the Washington

133. John Hart, *Crusade for Stephanie: Gene and Peggy Schmidt Remember Their Murdered Daughter by Trying to Keep Other Daughters Safe*, KAN. CITY STAR, Sept. 8, 1996, at H1. The date of Stephanie's disappearance is also reported as June 30, 1993. *See* Steve Fry, *Friend's Death Led Prosecutor to Field*, TOPEKA CAPITAL-J., Mar. 18, 2005, at 1A. Just before she disappeared, Stephanie had been celebrating her upcoming birthday, which would have been on July 4. *See id.*

134. Fry, *supra* note 133. Gideon had not been seen since Stephanie's disappearance; however, he turned himself over to police after he was featured on the television program *America's Most Wanted*. Austin T. DesLauriers, *Kansas' Sex Offender Treatment Program: Aims to Reduce Recidivism*, CORRECTIONS TODAY, Oct. 2002, at 118, *available at* 2002 WLNR 5439192. Gideon ultimately pleaded guilty to first degree murder and other charges and was sentenced to eighty-eight years in prison. Fry, *supra* note 133. *But see* Robert Boczkiewicz, *Judge Denies Murder Appeal*, TOPEKA CAPITAL-J., Dec. 14, 2001, at 3C ("Gideon was sentenced to life in prison without the possibility of parole for 40 years plus 59 2/3 years for kidnapping, rape, sodomy and murder.").

135. Fry, *supra* note 133; Kevin Hoffman, *Man Leaves Victims' Rights State Post*, KAN. CITY STAR, Nov. 9, 2004, at B4. Gideon abducted and murdered Stephanie nine months after his release. DesLauriers, *supra* note 134, at 118.

136. Hoffman, *supra* note 135.

137. Hart, *supra* note 133.

138. Kelly A. McCaffrey, *The Civil Commitment of Sexually Violent Predators in Kansas: A Modern Law for Modern Times*, 42 U. KAN. L. REV. 887, 887–89 (1994); *see also* S.B. 525, 1994 Leg., Reg. Sess., 1994 Kan. Sess. Laws 1824 (outlining the civil commitment procedure for sexually violent predators).

Supreme Court,[139] "was copied virtually verbatim and submitted to the Kansas Legislature,"[140] where it passed without significant opposition.[141]

Like the Washington law, the Kansas "sexually violent predator" commitment statute is based on legislative findings "that there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated," and that "the existing civil commitment procedures . . . are inadequate to address the special needs of sexually violent predators and the risks they present to society."[142] The definitions of the terms "sexually violent predator" and "mental abnormality" are essentially the same as those that appear in the Washington statute,[143] as is the commitment procedure itself.[144]

In August 1994, a petition was filed alleging that Leroy Hendricks, a convicted sex offender with a history of sexual involvement with children dating to 1955,[145] was a sexually violent predator.[146] When the petition was filed, Hendricks was nearing the completion of a 1984

139. McCaffrey, *supra* note 138, at 889; *see also In re* Young, 857 P.2d 989 (Wash. 1993). At the time of these events, the United States District Court for the Western District of Washington had not yet issued its opinion holding the Washington statute unconstitutional. *See* Young v. Weston, 898 F. Supp. 744, 745 (W.D. Wash. 1995).

140. DesLauriers, *supra* note 134, at 119.

141. "The bill calling for civil commitment passed in the House 101-23 and in the Senate 40-0 on Wednesday, April 27, 1994. Governor Finney signed the bill on Monday, May 9, 1994." McCaffrey, *supra* note 138, at 888.

142. KAN. STAT. ANN. § 59-29a01 (2005). The "existing civil commitment procedures," which were previously codified at KAN. STAT. ANN. §§ 59-2901 to -2944 (1994), now appear in the Care and Treatment Act for Mentally Ill Persons, KAN. STAT. ANN. §§ 59-2945 to -2986 (2005).

143. *Compare* KAN. STAT. ANN. § 59-29a02(a)–(b) (2005), *with* WASH. REV. CODE ANN. § 71.09.020(8), (16) (West Supp. 2005). The Kansas statute, like the Washington statute, does not define the term "personality disorder."

144. *Compare* KAN. STAT. ANN. §§ 59-29a02 to -29a07 (2005), *with* WASH. REV. CODE ANN. §§ 71.09.020–.060 (West 2002 & Supp. 2005).

145. Kansas v. Hendricks, 521 U.S. 346, 354–55 (1997). The *Hendricks* opinion states,

> [I]n 1955 . . . [Hendricks] exposed his genitals to two young girls. At that time, he pleaded guilty to indecent exposure. Then, in 1957, he was convicted of lewdness involving a young girl and received a brief jail sentence. In 1960, he molested two young boys while he worked for a carnival. After serving two years in prison for that offense, he was paroled, only to be rearrested for molesting a 7-year-old girl. Attempts were made to treat him for his sexual deviance, and in 1965 he was considered "safe to be at large," and was discharged from a state psychiatric hospital.
>
> Shortly thereafter, however, Hendricks sexually assaulted another young boy and girl . . . . He was again imprisoned in 1967, but refused to participate in a sex offender treatment program, and thus remained incarcerated until his parole in 1972. . . . [S]oon after his 1972 parole, Hendricks began to abuse his own stepdaughter and stepson. . . . Then

sentence that "had been imposed in accordance with the State's recommendation pursuant to a plea agreement."[147] A court considered the petition and determined that there was probable cause to believe that Hendricks was a sexually violent predator.[148] A trial was held, and the jury concluded that Hendricks, who admitted that he remained a pedophile,[149] was indeed a sexually violent predator.[150] As a result, he was committed to the care of a state hospital even though "professionals specifically dedicated to a treatment program for sexually violent predators were not available at the hospital."[151]

Hendricks appealed his commitment, arguing, among other things, that the commitment violated his "substantive due process liberty interest" because it was imposed without a finding that he was "mentally ill."[152] After studying the Washington Supreme Court's decision in *In re Young*[153] and the United States District Court's opinion in *Young v. Weston*,[154] the Kansas Supreme Court concluded that the Sexually Violent Predator Act was unconstitutional.[155] Its reasoning paralleled that of the federal court in Washington; specifically, the Kansas Supreme Court found that the Act was meant primarily "to continue incarceration and not to provide treatment" and that the Act permitted commitments in the absence of proof of a "mental illness" in violation of *Addington* and *Foucha*.[156]

After the Kansas Supreme Court invalidated the Sexually Violent Predator Act, the State of Kansas submitted a petition for certiorari to

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> . . . Hendricks was convicted of "taking indecent liberties" with two adolescent boys [in 1984].

Id. (citation omitted). *See also id.* at 353 (noting Hendricks' 1984 conviction for taking "indecent liberties").

146. *In re* Hendricks, 912 P.2d 129, 130–31 (Kan. 1996). Hendricks was approximately sixty years old when the petition was filed. *See id.*

147. *Id.* at 130. In exchange for Hendricks' plea of guilty to two counts of indecent liberties with a child, "[t]he State dismissed a third count . . . and refrained from requesting imposition of the Habitual Criminal Act." *Id.* "Under the Habitual Criminal Act, Hendricks' sentence could have been tripled." *Id.* at 137.

148. *Id.* at 130.

149. *Id.* at 130–31. Hendricks testified at his commitment trial that "when he gets 'stressed out,' he is unable to control the urge to engage in sexual activity with a child." *Id.* He also "stated that the only sure way he could keep from sexually abusing children in the future was 'to die,'" and reportedly told the state's physician that "treatment is bull——." *Hendricks*, 521 U.S. at 355.

150. *In re Hendricks*, 912 P.2d at 131.

151. *Id.*

152. *Id.* at 133.

153. *See supra* notes 61–104 and accompanying text.

154. *See supra* notes 105–32 and accompanying text.

155. *In re Hendricks*, 912 P.2d at 133–38.

156. *Id.* at 136, 137–38.

the United States Supreme Court.[157] The Court granted certiorari and reversed.[158] First, the Court concluded that, contrary to the holding of the Kansas Supreme Court, "the Act's definition of 'mental abnormality' satisfies 'substantive' due process requirements."[159] In support of this holding, the Court noted that "[a]lthough freedom from physical restraint '[is] at the core of the liberty protected by the Due Process Clause from arbitrary governmental action,'" states may provide "for the forcible civil detainment of people who are unable to control their behavior and who thereby pose a danger to the public health and safety," "provided the confinement takes place pursuant to proper procedures and evidentiary standards."[160] The Court agreed that "[a] finding of dangerousness, standing alone, is ordinarily not a sufficient ground upon which to justify indefinite involuntary commitment," and noted that it has "sustained civil commitment statutes when they coupled proof of dangerousness with the proof of some additional factor, such as a 'mental illness' or 'mental abnormality.'"[161] The Court stated that "[t]hese added statutory requirements serve to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control," and that

> [t]he Kansas Act is plainly of a kind with these other civil commitment statutes: It requires a finding of future dangerousness, and then links that finding to the existence of a "mental abnormality" or "personality disorder" that makes it difficult, if not impossible, for the person to control his dangerous behavior.[162]

In other words, proof of a "mental abnormality" or "personality disorder" as defined in the Act is sufficient to justify a civil commitment because "it narrows the class of persons eligible for confinement to those who are unable to control their dangerousness."[163]

The Court then turned to Hendricks' arguments that the Sexually Violent Predator Act violated the Double Jeopardy and Ex Post Facto

157. Hendricks filed a cross-petition in which he reasserted his ex post facto and double jeopardy claims, which were not addressed in the Kansas Supreme Court's majority opinion. *See* Kansas v. Hendricks, 521 U.S. 346, 350 (1997).

158. *See id.*

159. *Id.* at 356.

160. *Id.* at 356–57 (citations omitted) (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)).

161. *Id.* at 358 (citing Heller v. Doe, 509 U.S. 312, 314–15 (1993) (permitting commitment of "mentally retarded" or "mentally ill" and dangerous individuals); Allen v. Illinois, 478 U.S. 364, 366 (1986) (permitting commitment of "mentally ill" and dangerous individual); Minnesota *ex rel.* Pearson v. Probate Court of Ramsey County, 309 U.S. 270, 271–72 (1940) (permitting commitment of dangerous individual with "psychopathic personality")).

162. *Id.* (citing KAN. STAT. ANN. § 59-29a02(b) (1994)).

163. *Id.*

Clauses.[164] Recognizing that both arguments depended upon the theory that the Act "establishes criminal proceedings," the Court, like the courts in Washington, began by considering whether the Act is best categorized as "civil" or "criminal."[165] First, the Court concluded that "the legislature meant the statute to establish 'civil' proceedings," noting that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil commitment scheme designed to protect the public from harm."[166]

Next, the Court considered whether "'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[167] In making this determination, the Court found first that "commitment under the Act does not implicate either of the two primary objectives of criminal punishment: retribution or deterrence."[168] The Court explained,

> The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes, either to demonstrate that a "mental abnormality" exists or to support a finding of future dangerousness. We have previously concluded that an Illinois statute was nonpunitive even though it was triggered by the commission of a sexual assault, explaining that evidence of the prior criminal conduct was "received not to punish past misdeeds, but primarily to show the accused's mental condition and to predict future behavior." In addition, the Kansas Act does not make a criminal conviction a prerequisite for commitment—persons absolved of criminal responsibility may nonetheless be subject to confinement under the Act. An absence of the necessary criminal responsibility suggests that the State is not seeking retribution for a past misdeed. Thus, the fact that the Act may be "tied to criminal activity" is "insufficient to render the statut[e] punitive."[169]

The Court also noted that the absence of a scienter requirement provided additional support for the conclusion that the Act was not intended to be retributive.[170] Turning then to the second basic objective of criminal punishment—i.e., deterrence—the Court stated,

> Nor can it be said that the legislature intended the Act to function as a deterrent. Those persons committed under the Act are, by definition, suffering from a "mental abnormality" or a "personality disorder" that prevents them from exercising adequate control over their behavior. Such persons are therefore unlikely to be deterred by the threat of confinement. And the conditions surrounding that confinement do not suggest a punitive purpose on the State's part. The State has represented that an individual confined under the

164. *Id.* at 360–71. The Kansas Supreme Court determined that it need not address these arguments in view of its finding that the Act violated the Due Process Clause. *See In re* Hendricks, 912 P.2d 129, 138 (Kan. 1996).

165. *Hendricks*, 521 U.S. at 361.

166. *Id.*

167. *Id.* (quoting United States v. Ward, 448 U.S. 242, 248–49 (1980)).

168. *Id.* at 361–62.

169. *Id.* at 362 (citations omitted) (quoting Allen v. Illinois, 478 U.S. 364, 371 (1986); United States v. Ursery, 518 U.S. 267, 292 (1996)).

170. *Id.* (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963)).

> Act is not subject to the more restrictive conditions placed on state prisoners, but instead experiences essentially the same conditions as any involuntarily committed patient in the state mental institution. Because none of the parties argues that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, even though they may be involuntarily confined, it is difficult to conclude that persons confined under this Act are being "punished."[171]

The Court found next that although the commitment procedure involves an affirmative restraint, this "does not inexorably lead to the conclusion that the government has imposed punishment."[172] The Court stated, "If detention for the purpose of protecting the community from harm necessarily constituted punishment, then all involuntary civil commitments would have to be considered punishment."[173]

Finally, the Court rejected each of the three main counterarguments that Hendricks advanced in support of his claim that sexually violent predator commitments are punitive in nature. Hendricks first suggested that "his confinement's potentially indefinite duration [amounts to] evidence of the State's punitive intent."[174] The Court dismissed this suggestion out-of-hand, stating, "Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."[175] The Court also recognized that "[t]he maximum amount of time an individual can be incapacitated pursuant to a single judicial proceeding is one year."[176] Second, Hendricks claimed "that the State's use of procedural safeguards traditionally found in criminal trials makes the proceedings . . . criminal rather than civil."[177] However, the Court found that the safeguards simply "demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural standards."[178] Finally, Hendricks argued "that the Act is necessarily punitive because it fails to offer any legitimate 'treatment.'"[179] The Court addressed this argument at length, noting first that even if Hendricks' condition is untreatable, it does not follow that his commitment must be punitive.[180] The Court reasoned,

171. *Id.* at 362–63 (citation omitted).
172. *Id.* at 363 (quoting United States v. Salerno, 481 U.S. 739, 746 (1987)).
173. *Id.* (emphasis omitted).
174. *Id.*
175. *Id.*
176. *Id.* at 364 (citing KAN. STAT. ANN. § 59-29a08 (1994)). "If Kansas seeks to continue the detention beyond that year, a court must once again determine beyond a reasonable doubt that the detainee satisfies the same standards as required for the initial confinement." *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 365.
180. *Id.* at 365–66.

> We have already observed that, under the appropriate circumstances and when accompanied by proper procedures, incapacitation may be a legitimate end of the civil law. . . . A State could hardly be seen as furthering a "punitive" purpose by involuntarily confining persons afflicted with an untreatable, highly contagious disease. Similarly, it would be of little value to require treatment as a precondition for civil confinement of the dangerously insane when no acceptable treatment existed. To conclude otherwise would obligate a State to release certain confined individuals who were both mentally ill and dangerous simply because they could not be successfully treated for their afflictions.[181]

The Court also rejected the notion that the State's failure to make treatment its first priority did not render Hendricks' commitment punitive, because "critical language in the Act itself demonstrates that the [secretary of social and rehabilitation services], under whose custody sexually violent predators are committed, has an obligation to provide treatment to individuals like Hendricks."[182] The Court minimized the implications of the fact that "the treatment program initially offered Hendricks may have seemed somewhat meager," stating that "it must be remembered that he was the first person committed under the Act," and "[t]hat the State did not have all of its treatment procedures in place is thus not surprising."[183] The Court also noted that "Hendricks was placed under the supervision of the Kansas Department of Health and Social and Rehabilitative Services, housed in a unit segregated from the general prison population and operated not by the employees of the Department of Corrections, but by other trained individuals."[184]

In light of the Court's finding that commitments under the Kansas Sexually Violent Predator Act are not punitive, Hendricks's double jeopardy and ex post facto claims necessarily failed.[185] Since the Court also found that the Act "comports with due process requirements," the judgment of the Kansas Supreme Court holding the Act unconstitutional was reversed.[186]

D. The Aftermath of *Hendricks*

Two important issues arose in the wake of the Supreme Court's decision in *Hendricks*. First, *Hendricks* had direct implications for Andre Brigham Young, the successful habeas corpus petitioner in Washington. Although *Hendricks* decimated Young's original legal position, Young did find an alternate avenue of attack that was meritorious enough to require specific attention from the Court. Second,

181. *Id.* (citations omitted).
182. *Id.* at 367 (citing KAN. STAT. ANN. § 59-29a07(a) (1994)).
183. *Id.* at 367–68.
184. *Id.* at 368.
185. *Id.* at 369–71.
186. *Id.* at 371.

Hendricks raised a new practical question for the lower courts: How should the Court's substantive due process analysis and, more specifically, its holding that "mental abnormalities" and "personality disorders" are sufficient to justify civil commitments when they "narrow[] the class of persons eligible for confinement to those who are unable to control their dangerousness,"[187] be interpreted and applied? Ultimately, the Court was called upon to resolve this question as well. Each of these issues is discussed below.

1. *Andre Brigham Young and the Notion that a Statute Might Be Punitive "As Applied"*

After the Supreme Court's decision in *Hendricks*, the United States Court of Appeals for the Ninth Circuit remanded Young's case to the United States District Court for the Western District of Washington for reconsideration.[188] On remand, the district court denied Young's habeas petition.[189] Young appealed, and the Ninth Circuit reversed the district court's decision in part.[190] The court noted that, while "*Hendricks* forecloses the claim that the Washington statute, on its face, violates the *ex post facto* and double jeopardy clauses," it "does not preclude the possibility that the Washington statute, *as applied*, is punitive."[191] The court held that Young "alleged sufficient facts that, if proved, would constitute . . . 'clear proof' [that the statutory scheme is punitive in effect]."[192] These facts included the following: (1) "Young is subject to conditions more restrictive than those placed either on true civil commitment detainees or even those placed on state prisoners"; (2) "Young has been subject to such conditions for more than seven years"; (3) "[t]he Special Commitment Center is located wholly within the perimeter of a larger Department of Corrections facility and relies on the Department of Corrections for a host of essential services, including library services, medical care, food, and security"; (4) "[t]he conditions of confinement at the Special Commitment Center are not compatible with the Washington statute's treatment purposes"; (5) "[t]he Conditions and restrictions at the Special Commitment Center are not reasonably related to a legitimate nonpunitive goal"; (6) "[t]he conditions of confinement at the Special Commitment Center do not comport with substantive due process"; (7) "[c]ourt-appointed Resident Advocate, psychologist Stanley Greenberg, concluded in his final report, . . . 'I have come to suspect that [the Special Commitment Center] is designed . . . , either overtly or co-

187. *Id.* at 350.
188. Young v. Weston, 122 F.3d 38 (9th Cir. 1997).
189. *See* Young v. Weston, 192 F.3d 870, 873 (9th Cir. 1999).
190. *Id.* at 872.
191. *Id.* at 874.
192. *Id.*

vertly, to punish and confine these men and women to a life sentence without any hope of release to a less restrictive setting'"; (8) "[t]he Department of Corrections staff's role in running the Special Commitment Center had increased"; (9) "Special Commitment Center residents were housed in units that were, according to Special Master Janice Marques, 'clearly inappropriate for individuals in a mental health treatment program'"; and (10) "[t]here were still no certified sex-offender treatment providers at Special Commitment Center."[193] The Ninth Circuit found that because the "state courts did not afford Young a full and fair hearing concerning the conditions of confinement in the Special Commitment Center," Young was entitled to an evidentiary hearing in federal court.[194] Since the district court did not conduct such a hearing, the Ninth Circuit remanded the case for that purpose.[195]

Before this hearing was held, the Supreme Court granted certiorari to resolve the conflict between the Ninth Circuit's holding in *Young* and the Washington Supreme Court's holding in *In re Turay*,[196] wherein the court rejected a defendant's argument "that the conditions of confinement at the Center rendered the Washington Act punitive 'as applied' to him in violation of the Double Jeopardy Clause."[197] The Court reversed the Ninth Circuit's holding, stating,

> We hold that respondent cannot obtain release through an "as-applied" challenge to the Washington Act on double jeopardy and *ex post facto* grounds. We agree with petitioner that an "as-applied" analysis would prove unworkable. Such an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses. . . . The particular features of confinement may affect how a confinement scheme is evaluated to determine whether it is civil rather than punitive, but it remains no less true that the query must be answered definitively. The civil nature of a confinement scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute.[198]

The Court was careful to note, however, that its decision did not mean that persons "committed as sexually violent predators have no remedy for the alleged conditions and treatment regime at the Center."[199] Specifically, the Court observed that persons committed under the Act have a statutory "right to adequate care and individualized treatment"; that a challenge to the commitment scheme might be based on the due process requirement "that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose

193. *Id.* at 875 (footnotes omitted).
194. *Id.* at 876.
195. *Id.* at 877.
196. 986 P.2d 790 (Wash. 1999).
197. Seling v. Young, 531 U.S. 250, 257, 260 (2001).
198. *Id.* at 263 (citation omitted).
199. *Id.* at 265.

for which persons are committed"; and that the center was already operating under an injunction, issued in a § 1983 action, that required it to address many of the concerns raised by Young.[200]

2. The Inability to Control One's Dangerousness

As noted above, in *Hendricks* the Supreme Court determined that the statutory requirements of mental abnormality and personality disorder satisfy substantive due process requirements because they serve to limit "the class of persons eligible for confinement to those who are unable to control their dangerousness."[201] The Kansas Supreme Court attempted to apply this concept in its review of a challenge brought by Michael T. Crane, a convicted sex offender who had been committed as a sexually violent predator.[202]

On January 6, 1993, Crane exposed himself to a tanning salon attendant.[203] Thirty minutes later, he entered a video store, waited until he was the only customer in the store, and grabbed the clerk.[204] "With his genitals exposed, he lifted and pushed her and squeezed her neck with his hands."[205] Crane ordered the clerk to perform oral sex upon him and threatened to rape her, but "[t]he attack ended when Crane suddenly stopped and ran out of the store."[206] Crane was convicted of "lewd and lascivious behavior" based upon the incident at the tanning salon, and this conviction was affirmed on appeal.[207] However, Crane's convictions of attempted aggravated criminal sodomy, attempted rape, and kidnapping based upon the incident at the video store were reversed.[208] The sodomy and rape charges were refiled, and, pursuant to a plea agreement, Crane pleaded guilty to a single count of aggravated sexual battery.[209]

Thereafter, the State filed a petition to commit Crane as a sexually violent predator.[210] Evidence presented at the commitment trial indicated that Crane suffered from "antisocial personality disorder" and "exhibitionism," and a psychologist testified that these disorders, in combination, made Crane a sexually violent predator.[211]

200. *Id.* at 265–66; *see also* Turay v. Seling, 108 F. Supp. 2d 1148, 1154–55 (W.D. Wash. 2000) (finding that the center had taken steps to fulfill the injunction's requirements).
201. Kansas v. Hendricks, 521 U.S. 346, 358 (1997).
202. *In re* Crane, 7 P.3d 285, 286 (Kan. 2000).
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 286–87.

Crane challenged his commitment on the ground that under *Hendricks*, it was not "constitutionally permissible to commit [him] as a sexual predator absent a showing that he was unable to control his dangerous behavior."[212] The Kansas Supreme Court agreed.[213] The court recognized that the Sexually Violent Predator Act "does not expressly prohibit confinement absent a finding of uncontrollable dangerousness."[214] Indeed, the court observed that the Act specifically states that sexually violent predator commitments can be based upon mental impairments that affect volitional *or emotional* capacity, and that an impairment that affected emotional capacity might not affect a person's ability to control his conduct.[215] Noting, however, that the majority opinion in *Hendricks* is "replete with references to the commitment of persons who cannot control their own behavior,"[216] the court ultimately concluded that *Hendricks* "read[s] a requirement of inability to control behavior into the Act in order to uphold its constitutionality."[217] Since the jury had not been instructed to determine whether Crane was unable to control his behavior, the court remanded the case for a new commitment trial.[218]

The United States Supreme Court granted certiorari and held that the Kansas Supreme Court "interpreted . . . *Hendricks* in an overly restrictive manner."[219] The Court explained that "*Hendricks* set forth no requirement of *total* or *complete* lack of control."[220] Rather, "there must be proof of serious difficulty in controlling behavior" that,

> when viewed in light of such features of the case as the nature of the psychiatric diagnosis, and the severity of the mental abnormality itself, must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case.[221]

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212. *Id.* at 287.
213. *Id.* at 290.
214. *Id.* at 289.
215. *See id.* at 289–90.
216. *Id.* at 288 (citing Kansas v. Hendricks, 521 U.S. 346, 357–58, 360, 362, 364 (1997)).
217. *Id.* at 290.
218. *Id.* The court also considered and rejected Crane's arguments that the Sexually Violent Predator Act, as applied to him, violated the Ex Post Facto and Double Jeopardy Clauses. *See id.* at 290–92. However, the court seemed to reject Crane's arguments reluctantly, in part because it believed that Justice Kennedy's concurrence in *Hendricks* could be read to support the notion that "the determination whether punishment is being imposed is factual[,] so . . . it may vary from case to case." *Id.* at 291. As noted above, the Supreme Court later concluded that "as-applied" ex post facto and double jeopardy challenges cannot proceed. Seling v. Young, 531 U.S. 250, 263 (2001); *see supra* notes 197–98 and accompanying text.
219. Kansas v. Crane, 534 U.S. 407, 409 (2002).
220. *Id.* at 411.
221. *Id.* at 413 (citing *Hendricks*, 521 U.S. at 357–58; Foucha v. Louisiana, 504 U.S. 71, 82–83 (1992)).

The Court also noted, however, that it "had no occasion [either in *Crane* or in *Hendricks*] to consider whether confinement based solely on 'emotional' abnormality would be constitutional."[222]

E. Conclusion

Throughout American legal history, sex offenders have been classified and dealt with alternately as "criminals" or mentally ill "deviants." Certain sex offenders are deemed to be *both*, however, under Washington's sexually violent predator commitment procedure. This procedure, which was subsequently adopted in Kansas, facilitates the civil commitment of sex offenders upon their release from prison and thereby allows their incapacitation to continue without interruption. The sexually violent predator commitment procedure achieves this continued incapacitation by shifting the justification for the incapacitation from a criminal conviction to a civil commitment. By definition, however, sexual predators lack the sort of psychological impairments that would render them eligible for ordinary civil commitments.[223] Instead, their commitments are justified on the basis of mental abnormalities or personality disorders which make them likely to engage in "predatory acts of sexual violence" if they are not confined.[224]

Courts have struggled to determine whether the "mental abnormality or personality disorder" commitment standard is consistent with the substantive requirements of due process; indeed, courts that have considered the question have arrived at opposite conclusions.[225] The Supreme Court resolved the issue by holding that the standard is sufficient to justify civil commitments because "[i]t requires a finding of future dangerousness, and then links that finding to the existence of a 'mental abnormality' or 'personality disorder' that makes it difficult, if not impossible, for the person to control his dangerous behavior."[226] The Court later clarified that in order to "distinguish[ ] a dangerous sexual offender subject to civil commitment 'from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings,'"[227] "there must be proof of serious difficulty in controlling behavior."[228] However, the Court left open the question of whether a sexual predator commitment may be

222. *Id.* at 415.

223. *See, e.g.*, WASH. REV. CODE ANN. § 71.09.010 (West 2002).

224. *E.g.*, WASH. REV. CODE ANN. § 71.09.020(16) (West Supp. 2005).

225. *Compare, e.g.*, *In re* Young, 857 P.2d 989, 1001–04 (Wash. 1993), *with* Young v. Weston, 898 F. Supp. 744, 748–51 (W.D. Wash. 1995).

226. *Hendricks*, 521 U.S. at 358 (citing KAN. STAT. ANN. § 59-29a02(b) (1994)).

227. Kansas v. Crane, 534 U.S. 407, 412 (2002) (quoting *Hendricks*, 521 U.S. at 360).

228. *Id.* at 413.

based on a purely emotional (i.e., completely nonvolitional) impairment.[229]

Courts that have considered whether sexually violent predator commitments are truly civil or criminal in nature have also reached opposite conclusions.[230] Ultimately, the Supreme Court found that the Kansas Sexually Violent Predator Act did not establish a criminal proceeding, in part because the statute did "not implicate either of the two primary objectives of criminal punishment: retribution or deterrence."[231] The Court also found that the conditions of confinement did "not suggest a punitive purpose on the State's part," and it noted that since no party argued "that people institutionalized under the Kansas general civil commitment statute are subject to punitive conditions, . . . it is difficult to conclude that persons confined under this Act are being 'punished.'"[232] Andre Brigham Young, who had been committed as a sexual predator in Washington, seized upon this latter statement and challenged his commitment on the ground that the conditions of his own confinement rendered the commitment statute punitive as applied to him.[233] The Court rejected Young's challenge, holding "that an 'as-applied' analysis would prove unworkable" and "would never conclusively resolve whether a particular scheme is punitive."[234] However, the Court observed that sexually violent predators might base challenges to the conditions of their confinement on other theories, including a statute-based right to adequate care or a due process challenge based on the requirement "that the conditions and duration of confinement under the Act bear some reasonable relation to the purpose for which persons are committed."[235]

As the constitutionality of sexual predator commitments became more firmly established, more states began adopting similar commitment statutes.[236] Nebraska's recently adopted version of the sexual predator commitment procedure is described below.

III. THE NEBRASKA SEX OFFENDER COMMITMENT ACT

Motivated in part by a pair of assaults perpetrated by former residents of a mental health center's sex offender unit, the Nebraska

229. *Id.* at 415.
230. *Compare, e.g.*, *In re Young*, 857 P.2d at 996–1000, *with Young*, 898 F. Supp. at 751–53.
231. *Hendricks*, 521 U.S. at 361–62.
232. *Id.* at 363.
233. *See* Young v. Weston, 192 F.3d 870, 874–75 (9th Cir. 1999).
234. Seling v. Young, 531 U.S. 250, 263 (2001).
235. *Id.* at 265 (citing Foucha v. Louisiana, 504 U.S. 71, 79 (1992); Youngberg v. Romeo, 457 U.S. 307, 324 (1982); Jackson v. Indiana, 406 U.S. 715, 738 (1972)).
236. *See* John W. Parry, *Shrinking Civil Rights of Alleged Sexually Violent Predators*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 318, 321 (2001).

Legislature passed a package of sex offender provisions in 2006.[237] The new legislation includes a commitment procedure that, like the sexual predator commitment procedures adopted in Washington and Kansas, facilitates the civil commitment of sex offenders who are nearing the end of their prison terms.[238] This Part describes Nebraska's new commitment procedure and compares it to the Washington and Kansas procedures.

A. Background

In April 2004, Roger Einspahr, a former resident of the Lincoln (Nebraska) Regional Center's sex offender unit, "dragged a boy from his bicycle in a west Lincoln neighborhood, took the boy into his bedroom [at a group home] and stabbed him with a knife."[239] Within eighteen months, Joseph Siems, Jr., another former resident of the Lincoln Regional Center, traveled on a crosstown bus to Arnold Elementary School in Lincoln, Nebraska; hid himself in a bathroom; and sexually assaulted a five-year-old boy.[240]

The Einspahr and Siems incidents spurred a series of community and governmental responses. Einspahr's assault provoked outrage from residents living near his group home,[241] and Nebraska Governor Mike Johanns ordered a review to determine whether "people with profiles similar to . . . Einspahr['s] . . . [were] in secure residences."[242] This review led directly to the creation of a new program at the Hastings (Nebraska) Regional Center to provide a "more structured, se-

237. *See infra* section III.A.

238. *See infra* sections III.B–C.

239. Nate Jenkins, *Sex Assaults Spur Audit of Programs*, LINCOLN J. STAR, Feb. 5, 2006, at 1A, *available at* http://www.journalstar.com/articles/2006/02/05/local/doc43e560a3b9049598347546.txt. Initially, Einspahr was charged with kidnapping, second-degree assault, and using a weapon to commit a felony; however, the charges were dropped and civil commitment proceedings were initiated after he was found to lack competence to proceed to trial. Margaret Reist, *Group-home Resident Charges Dropped*, LINCOLN J. STAR, Nov. 5, 2004, at 1B, *available at* http://www.journalstar.com/articles/2004/11/04/top_story/extras/doc418b105d7b365046518332.txt.

240. Jenkins, *supra* note 239; Butch Mabin & Gwen Tietgen, *Siems Gets 20-30 Years*, LINCOLN J. STAR, Jan. 18, 2006, at 1A, *available at* http://www.journalstar.com/articles/2006/01/18/local/doc43cd882d56518711098841.txt. Siems, who reportedly "had a history of sexual deviancy," pleaded guilty to first-degree sexual assault of a child, and was sentenced to 20–30 years imprisonment. *Id.*

241. Leah Thorsen & Chris Aponick, *Neighbors Demand Answers*, LINCOLN J. STAR, Apr. 10, 2004, at 1A, *available at* http://www.journalstar.com/articles/2004/04/10/top_story/10047936.txt.

242. Leah Thorsen, *Attack on Boy Sparks Inquiry*, LINCOLN J. STAR, Apr. 9, 2004, at 1A, *available at* http://www.journalstar.com/articles/2004/04/09/local/10047916.txt.

cure environment" for adults with developmental disabilities.[243] After the Siems assault, a committee of state senators ordered an audit of the sex offender treatment programs at the Lincoln Regional Center.[244] In addition, during the 2006 legislative session, state senators proposed at least eight different bills concerning "sexual predators."[245] One of these bills, Legislative Bill 1199, was passed by the legislature without a dissenting vote[246] and was signed by Nebraska Governor Dave Heineman on April 13, 2006.[247] The bill amended the criminal code to redefine sexual offenses against children; increased "the penalty for a second conviction for failing to comply with the [sex offender] registration requirements"; "[e]xpand[ed] the list of offenses that . . . require registration under [Nebraska's] Sex Offender Registration Act"; lengthened the post-release supervision of certain sex offenders; authorized municipalities to impose residency restrictions on sex offenders; and directed the creation of a working group to study "sex offender treatment and management."[248] It also created a new civil commitment procedure for sex offenders called "the Sex Offender Commitment Act."[249]

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243. Nancy Hicks, *Stabbing Leads to New Program*, LINCOLN J. STAR, Sept. 16, 2004, at 2B, *available at* http://www.journalstar.com/articles/2004/09/16/nebraska/10055092.txt.

244. Jenkins, *supra* note 239.

245. Nancy Hicks, *Senators Focus on Sex Assault Restrictions*, LINCOLN J. STAR, Feb. 13, 2006, at 1A, *available at* http://www.journalstar.com/articles/2006/02/13/local/doc43efce8a8c55f516097252.txt.

246. Governor Dave Heineman, Official Nebraska Government Website, A Productive Session (April 17, 2006), http://www.gov.state.ne.us/archive/columns/2006/0417.html.

247. L.B. 1199, 99th Leg., 2d Sess. (Neb. 2006). Interestingly, a few weeks before the signing of Legislative Bill 1199, the *Lincoln Journal Star* reported that sex offenses were on the decline nationwide and in Nebraska. *See* Nate Jenkins, *States Get Tough While Sex Offenses on Decline*, LINCOLN J. STAR, Mar. 19, 2006, at 1A, *available at* http://www.journalstar.com/articles/2006/03/19/top_story/extras/doc441cb41c44c27776003376.txt.

248. JUDICIARY COMM., INTRODUCER'S STATEMENT OF INTENT: L.B. 1199, 99th Leg., 2d Sess. (Neb. 2006), *available at* http://srvwww.unicam.state.ne.us/unicamAllDrafting.html (search "Search Drafting for" for "LB 1199" in the "99th - Statements of Intent" index; then follow link for "Microsoft Word - SI LB1199.doc"); JUDICIARY COMM., COMMITTEE STATEMENT: L.B. 1199, 99th Leg., 2d Sess., at 3 (Neb. 2006), *available at* http://srvwww.unicam.state.ne.us/unicamAllDrafting.html (search "Search Drafting for" for "LB 1199" in the "99th - Committee Statements" index; then follow link for "Microsoft Word - CS LB1199.doc").

249. L.B. 1199, §§ 57–82, 86–91. The bill states that only sections 57 through 82 "may be cited as the Sex Offender Commitment Act." *Id.* § 57. However, key definitions are set forth in section 87, and, as shown below, sections 86 through 91 contain provisions that are analogous to those found in the Washington and Kansas sexually violent predator statutes. *See infra* section III.C. For the purposes of this Article, references to the Sex Offender Commitment Act should be read to include sections 86 through 91 of Legislative Bill 1199.

B. The Sex Offender Commitment Act: A Brief Overview

Nebraska's Sex Offender Commitment Act is designed "to provide for the court-ordered treatment of ['dangerous] sex offenders[']] who have completed their sentences but continue to pose a threat of harm to others."[250] The Act defines a "dangerous sex offender" as:

> (a) a person who suffers from a mental illness which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of one or more sex offenses, and who is substantially unable to control his or her criminal behavior or (b) a person with a personality disorder which makes the person likely to engage in repeat acts of sexual violence, who has been convicted of two or more sex offenses, and who is substantially unable to control his or her criminal behavior.[251]

If a county attorney believes that a person is a dangerous sex offender and that the person should be subject to an involuntary treatment order, he or she must file a petition to initiate proceedings under the Act.[252] After the petition is filed, a mental health board[253] must hold a hearing "to determine whether there is clear and convincing evidence that the subject [of the petition] is a dangerous sex offender as alleged in the petition."[254] If the subject denies the petition's allegations, the state must attempt to prove that the subject is a dangerous sex offender and that

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250. L.B. 1199, § 58.

251. *Id.* § 87(1).

252. *Id.* § 61. Persons alleged to be "dangerous sex offenders" are brought to the attention of county attorneys in various ways. *See, e.g.*, *id.* § 60 (providing that mental health professionals must submit a certificate to the county attorney upon determining that a person admitted for emergency protective custody is a dangerous sex offender); *id.* § 61 (providing that "[a]ny person who believes that another person is a dangerous sex offender may communicate such belief to the county attorney"); *id.* § 77 (providing that a mental health board must be notified of the release of any individual committed by the board, and that the board must forward that notice to the county attorney); *id.* § 86 (providing that an agency with jurisdiction over a person who is required to register as a sex offender must notify the county attorney, among others, at least ninety days before that person's release from incarceration or civil commitment or the termination of that person's probation or parole supervision); *id.* § 88 (providing that the Department of Corrections must evaluate certain convicted offenders prior to their scheduled release to determine whether they are dangerous sex offenders and notify the county attorney, among others, of the findings).

253. Mental health boards, which are created by "[t]he presiding judge[s] in each district court judicial district," perform various functions specified in the Nebraska Mental Health Commitment Act. NEB. REV. STAT. § 71-915 (Cum. Supp. 2006). Each board consists of a licensed Nebraska attorney, who serves as the board's chair, "and any two of the following but not more than one from each category: A physician, a psychologist, a psychiatric social worker, a psychiatric nurse, a clinical social worker, or a layperson with a demonstrated interest in mental health and substance dependency issues." *Id.* As the following discussion illustrates, the Sex Offender Commitment Act assigns additional duties to the mental health boards.

254. L.B. 1199, § 64.

> neither voluntary hospitalization nor other treatment alternatives less restrictive of the subject's liberty than inpatient or outpatient treatment ordered by the mental health board are available or would suffice to prevent the harm described in subdivision (1) of section 87 of this act.[255]

Subdivision (1) of section 87 of the Act simply defines the term "dangerous sex offender," so, presumably, the "harm described" in that subsection is the likelihood that the subject of the petition will "engage in repeat acts of sexual violence."[256]

If, at the conclusion of the hearing, the mental health board determines that the subject is not a dangerous sex offender, the subject must be discharged unconditionally.[257] If the board determines "that the subject is a dangerous sex offender, but that voluntary hospitalization or other treatment alternatives less restrictive of the subject's liberty than treatment ordered by the mental health board" are both available and adequate, the board may discharge the subject unconditionally or suspend proceedings for up to ninety days "to permit the subject to obtain voluntary treatment."[258] If the board finds that the subject is a dangerous sex offender and that less restrictive treatment alternatives must be ruled out, the board must order the subject to receive inpatient or outpatient treatment.[259] The Act provides, however, that "[i]npatient hospitalization or custody shall only be considered as a treatment alternative of last resort."[260] Subjects ordered to receive treatment are assigned a treatment plan,[261] and their progress under the plan must be reported to the mental health board at regular intervals.[262] Upon the filing of each progress report, a subject may demand a review hearing before the board and request an order of discharge.[263]

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255. *Id.* § 65(1).

256. *See supra* note 251 and accompanying text.

257. L.B. 1199, § 65(2).

258. *Id.* § 65(3). During the suspension period, the county attorney may apply to reinstate the proceedings against the subject. If no such application is filed, the board must order the unconditional discharge of the person at the conclusion of the period. *Id.*

259. *Id.* § 65(4). The same result ensues if the subject admits the allegations set forth in the petition. *See id.*

260. *Id.* § 65(6).

261. *Id.* § 71.

262. *Id.* § 72. Throughout the first year of a subject's commitment, progress reports must be submitted every ninety days. Thereafter, progress reports follow at six-month intervals. *Id.*

263. *Id.* § 75.

C. A Comparison of the Sex Offender Commitment Act and the Sexually Violent Predator Commitment Procedures

Nebraska's Sex Offender Commitment Act differs from the sexually violent predator legislation adopted in Washington and Kansas in many respects. For example, in Washington and Kansas, a judge presides over the sexual predator commitment proceedings; the commitment criteria must be proved beyond a reasonable doubt; and any party or the court may demand a jury.[264] In contrast, under Nebraska's procedure, dangerous sex offenders are subject to involuntary treatment after a mental health board determines that the commitment criteria are supported by clear and convincing evidence.[265] Another significant distinction lies in the various acts' provisions concerning the availability of "less restrictive" treatment alternatives. Nebraska's Sex Offender Commitment Act expresses a clear preference for voluntary treatment,[266] lists involuntary confinement as a treatment of "last resort,"[267] and assigns to the state the burden of proving that certain "less restrictive" treatment alternatives are unsuitable in a given case.[268] In Washington and Kansas, the state bears no such burden during a sexual predator commitment trial;[269]

264. KAN. STAT. ANN. §§ 59-29a06, 59-29a07 (2005); WASH. REV. CODE ANN. §§ 71.09.050(3), 71.09.060(1) (West 2002 & Supp. 2005).

265. L.B. 1199, §§ 64–65. It should be noted that a dangerous sex offender may appeal a mental health board's treatment order to the district court, which reviews the appeal "de novo on the record." *Id.* § 70.

266. *Id.* § 58 ("It is the public policy of the State of Nebraska that dangerous sex offenders be encouraged to obtain voluntary treatment.").

267. *Id.* § 65(6).

268. *Id.* § 65.

269. *See In re* Detention of Taylor, 134 P.3d 254, 261 (Wash. Ct. App. 2006) ("[T]he Washington Supreme Court effectively relieved the State of its previous obligation to prove that [an alleged predator] was not safe to be released to a less restrictive alternative to total confinement."). As noted above, sexually violent predator commitments in Washington are reviewed on at least an annual basis, and if less restrictive alternatives are deemed to be appropriate, they may be imposed following those reviews. *See supra* note 58 and accompanying text.

The Kansas statute provides that if a person is found to be a sexually violent predator, he must be committed "for control, care and treatment [at a facility operated by the department of social and rehabilitation services] until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large." KAN. STAT. ANN. § 59-29a07(a) (2005). "At all times, persons committed for control, care and treatment . . . shall be kept in a secure facility . . . ." *Id.* § 59-29a07(b). The statute includes no mention of least restrictive alternatives; however, it does provide for an annual review procedure, which can lead to the "transitional release" of a sexually violent predator. *See id.* § 59-29a08.

indeed, Washington's statute *defines* sexually violent predators as persons who must be "confined in a secure facility."[270]

Other, more subtle differences—along with several similarities—emerge upon close inspection of the Sex Offender Commitment Act's definition of a "[d]angerous sex offender."[271] Four main elements inhere in this definition, and each of these elements will be compared, in turn, with corresponding provisions of the Washington and Kansas predator statutes.

First, in order to qualify as a "dangerous sex offender" in Nebraska, a person must suffer from a "mental illness" or a "personality disorder."[272] The terms "mental illness" and "personality disorder" seem to parallel the "mental abnormality [and] personality disorder" commitment criteria in Washington and Kansas.[273] It should be noted, however, that the Nebraska statute's definition of the term "mental illness" is taken directly from the Nebraska Mental Health Commitment Act,[274] which is the state's "standard" civil commitment statute;[275] in contrast, the term "mental abnormality" is unique to the Washington and Kansas sexually violent predator acts—that is, it is not found elsewhere in those states' civil commitment statutes.[276]

Second, a dangerous sex offender's mental illness or personality disorder must make him "likely to engage in repeat acts of sexual vio-

270. WASH. REV. CODE ANN. § 71.09.020(16) (West Supp. 2005). *See also* KAN. STAT. ANN. § 59-29a01 (2005) (noting that the dangers presented by sexually violent predators make "it . . . necessary to house involuntarily committed sexually violent predators in an environment separate from persons" committed under the state's standard civil commitment procedures); WASH. REV. CODE ANN. § 71.09.015 (West 2002) ("The legislature hereby clarifies that it intends . . . that the court and jury be presented only with conditions that would exist or that the court would have the authority to order in the absence of a finding that the person is a sexually violent predator.").

271. L.B. 1199, § 87(1).

272. *Id.*

273. *See* KAN. STAT. ANN. § 59-29a02(a)–(b) (2005); WASH. REV. CODE ANN. § 71.09.020(8), (16) (West Supp. 2005).

274. NEB. REV. STAT. §§ 71-901 to -962 (Cum. Supp. 2006).

275. *See id.* § 71-902 ("The purpose of the Nebraska Mental Health Commitment Act is to provide for the treatment of persons who are mentally ill and dangerous.").

276. To refresh, the Kansas and Washington statutes define "mental abnormality" as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses in a degree constituting such person a menace to the health and safety of others." KAN. STAT. ANN. § 59-29a02(b) (2005); WASH. REV. CODE ANN. § 71.09.020(8) (West Supp. 2005). In Nebraska, the term "mental illness" is defined as "a psychiatric disorder that involves a severe or substantial impairment of a person's thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person's ability to meet the ordinary demands of living or interferes with the safety or well-being of others." NEB. REV. STAT. § 71-907 (Cum. Supp. 2006). *See also* L.B. 1199, § 87(3) (citing NEB. REV. STAT. § 71-907 for definition of "mental illness").

lence," which, according to the Nebraska act, means that "the person's propensity to commit sex offenses resulting in serious harm to others is of such a degree as to pose a menace to the health and safety of the public."[277] This definition is virtually identical to that appearing in the Kansas Sexually Violent Predator Act,[278] and similar language appears in Washington's definition of the term "mental abnormality."[279]

Third, the Nebraska statute provides that if the alleged "dangerous sex offender" suffers from a mental illness, he must have one or more prior convictions for "sex offenses"; persons with personality disorders must have at least two "sex offense[ ]" convictions.[280] For the purposes of the Sex Offender Commitment Act, "[s]ex offense[s]" are defined as "any of the offenses . . . for which registration as a sex offender is required."[281] Similarly, under the Washington and Kansas statutes, sexual predator commitments can be imposed upon persons who have been convicted of any one of several enumerated sex offenses; however, in some instances, a person may be eligible for commitment if he has merely been charged with one of these offenses.[282]

Fourth and finally, under the Nebraska act a dangerous sex offender must be "[s]ubstantially unable to control his or her criminal behavior," which means that the person has "serious difficulty in controlling or resisting the desire or urge to commit sex offenses."[283] This element incorporates the Supreme Court's requirement, announced in *Crane*, that "there must be proof of serious difficulty in controlling behavior" that distinguishes persons who may be civilly committed "from the dangerous but typical recidivist."[284]

277. L.B. 1199, § 87(1)–(2).

278. KAN. STAT. ANN. § 59-29a02(c) (2005).

279. As noted above, the term mental abnormality is defined as "a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to the commission of criminal sexual acts *in a degree constituting such person a menace to the health and safety of others*." WASH. REV. STAT. ANN. § 71.09.020(8) (West Supp. 2005) (emphasis added).

280. L.B. 1199, § 87(1). Interestingly, neither Roger Einspahr nor Joseph Siems would have been eligible for commitment under the Sex Offender Commitment Act prior to their highly publicized attacks because "[n]either man had been convicted of a [sex offense]." Nate Jenkins & Nancy Hicks, *Around the Rotunda: Cases Unaffected by Sex Crimes Bills*, LINCOLN J. STAR, Feb. 14, 2006, at 1B, *available at* http://www.journalstar.com/articles/2006/02/14/local/doc43f135d6585ee379855932.txt.

281. L.B. 1199, § 87(5) (citing NEB. REV. STAT. § 29-4003 (listing the offenses covered by the Nebraska Sex Offender Registration Act)).

282. KAN. STAT. ANN. § 59-29a02(a), (e) (2005); WASH. REV. CODE ANN. § 71.09.020(15), (16) (West Supp. 2005).

283. L.B. 1199, § 87(6).

284. Kansas v. Crane, 534 U.S. 407, 413 (2002) (citing Kansas v. Hendricks, 521 U.S. 346, 357–58 (1997)).

As the foregoing discussion illustrates, the Nebraska Sex Offender Commitment Act differs from the Kansas and Washington sexually violent predator laws in several respects. Many of these differences, such as Nebraska's use of mental health board hearings and the clear-and-convincing standard of proof in those hearings, may be attributed to the Nebraska Legislature's decision to have the Sex Offender Commitment Act parallel the state's standard commitment process,[285] which is set forth in the Nebraska Mental Health Commitment Act.[286] Despite these differences, however, it is clear that the Nebraska act includes several provisions that have been adapted from the Washington and Kansas statutes and related court decisions. For the purposes of this Article, the key similarity between Nebraska's new commitment procedure and the Washington and Kansas procedures lies in the statutes' authorization of civil commitments of persons "who do not meet the traditional mentally ill and dangerous civil commitment standard."[287]

The Sex Offender Commitment Act expands Nebraska's traditional commitment criteria in two key respects. First, although it is true that the Sex Offender Commitment Act incorporates the definition of "mental illness" set forth in the Nebraska Mental Health Commitment Act,[288] the Sex Offender Commitment Act also applies to persons "diagnosed with a personality disorder."[289] If, as some have claimed, 40–60% of the male prison population can be diagnosed with antisocial personality disorder,[290] the new act has the potential to reach many persons who would not qualify for commitment under the traditional "mental illness" criterion.[291] Second, the Sex Offender

285. JUDICIARY COMM., COMMITTEE STATEMENT: L.B. 1199, 99th Leg., 2d Sess., at 3 (Neb. 2006), *available at* http://srvwww.unicam.state.ne.us/unicamAllDrafting.html (search "Search Drafting for" for "LB 1199" in the "99th - Committee Statements" index; then follow link for "Microsoft Word - CS LB1199.doc").

286. NEB. REV. STAT. §§ 71-901 to -962 (Cum. Supp. 2006).

287. JUDICIARY COMM., COMMITTEE STATEMENT: L.B. 1199, 99th Leg., 2d Sess., at 3 (Neb. 2006), *available at* http://srvwww.unicam.state.ne.us/unicamAllDrafting.html (search "Search Drafting for" for "LB 1199" in the "99th - Committee Statements" index; then follow link for "Microsoft Word - CS LB1199.doc"). *See also* KAN. STAT. ANN. § 59-29a01 (2005) (discussing how "sexually violent predators" do not meet the requirements of the standard civil commitment procedure); WASH. REV. CODE ANN. § 71.09.010 (West 2002) (same).

288. *See supra* notes 274–76 and accompanying text.

289. L.B. 1199, 99th Leg., 2d Sess. § 87(4) (Neb. 2006).

290. Kansas v. Crane, 534 U.S. 407, 412 (2002) (citing P. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)). Some estimate that seventy-five percent, or even ninety percent, of prisoners could be diagnosed with this disorder. *See* Lisa Ells, Note, *Juvenile Psychopathy: The Hollow Promise of Prediction*, 105 COLUM. L. REV. 158, 182 n.154 (2005).

291. Presumably, a personality disorder can satisfy Nebraska's "traditional" definition of mental illness if it "involves a severe or substantial impairment of a person's

Commitment Act significantly alters the traditional "dangerousness" criterion. The Nebraska Mental Health Commitment Act provides for the commitment of persons who, because of their mental illness, present "[a] substantial risk of serious harm to another person or persons within the near future *as manifested by evidence of recent violent acts or threats of violence or by placing others in reasonable fear of such harm.*"[292] Under the Sex Offender Commitment Act, no such evidence is required—though presumably it would be relevant to establish the "dangerous sex offender" commitment criterion.

These two modifications to the traditional commitment criteria allow the Sex Offender Commitment Act to serve the controversial function that the Washington and Kansas sexually violent predator statutes were designed to perform—and that the United States Supreme Court, along with courts in Washington and Kansas, have struggled to reconcile with the constitutional prohibitions against double jeopardy and ex post facto punishment and principles of substantive due process. Specifically, the new Nebraska law, like the Washington and Kansas statutes discussed above, facilitates the civil commitment of convicted sex offenders nearing the completion of their prison sentences who do not have the sort of psychological impairment that would ordinarily subject them to commitment and who have not committed recent acts that demonstrate their dangerousness. The next Part of this Article attempts to explain why this controversial type of civil commitment—which shall be referred to hereinafter as a "convicted sex offender commitment"—has presented such difficulties for the courts that have attempted to analyze its constitutionality. In addition, it will be argued that these commitments distort the social functions performed by criminal punishment and civil commitment in the American legal system, and thereby unsettle the justifications for civil and criminal deprivations of liberty.[293]

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thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person's ability to meet the ordinary demands of living or interferes with the safety or well-being of others." NEB. REV. STAT. § 71-907 (Cum. Supp. 2006). Under the Sex Offender Commitment Act, however, one is eligible for commitment merely by virtue of his personality disorder diagnosis, even if the disorder causes no "severe or substantial impairments"—provided, of course, that the remaining commitment criteria are satisfied. *See* L.B. 1199, § 87.

292. NEB. REV. STAT. § 71-908(1) (Cum. Supp. 2006) (emphasis added).

293. A number of points that this Article does *not* attempt to address merit mention. First and foremost, this Article does not argue that Nebraska's Sex Offender Commitment Act is or is not constitutional; nor does it argue that the Act is analogous to or distinguishable from the Washington and Kansas sexual predator statutes in ways that affect the applicability of *Hendricks*, *Crane*, and other cases to the Nebraska act.

In addition, the interplay between the Sex Offender Commitment Act and other Nebraska statutes may raise interesting issues that, unfortunately, are beyond the scope of this Article. For example, if a person suffers from a mental

IV. CONDEMNATION, CIVIL COMMITMENT, AND THE EXPRESSIVE FUNCTION OF CONVICTED SEX OFFENDER COMMITMENTS

The legal debate surrounding convicted sex offender commitments focuses on two fundamental questions: First, are these commitments truly civil, as opposed to criminal; and second, what sort of psychological impairment must exist, in combination with dangerousness, to justify the State's infringement of an individual's liberty interest?[294] The fact that federal and state courts have arrived at different answers to these questions suggests that clear answers are difficult to articulate and defend. However, the answers to these questions are not only relevant to the constitutionality of convicted sex offender commitment schemes, but are also critical to a proper understanding of the interrelationship between the broader concepts of criminal responsibility and psychological impairment. In other words, convicted sex offender commitments are not merely controversial in terms of their constitutionality—which, in and of itself, suggests that their place within the fundamental legal structure governing our society is difficult to define—but they are also controversial insofar as they blur the conceptual lines that separate those persons who are justly held responsible

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illness or personality disorder within the meaning of the Sex Offender Commitment Act but also suffers from a developmental disability, it may not be clear whether the person falls within the ambit of the Sex Offender Commitment Act or the Developmental Disabilities Court-Ordered Custody Act, NEB. REV. STAT. §§ 71-1101 to -1134 (Cum. Supp. 2006). *See also* NEB. REV. STAT. §§ 83-1201 to -1226 (Reissue 1999 & Cum. Supp. 2006) (addressing services to persons with developmental disabilities). It should be noted, too, that Nebraska has a "sexually violent predator" statute apart from the Sex Offender Commitment Act. When a person is convicted of an offense that requires him to register under the Sex Offender Registration Act—which, as explained above, is a prerequisite for commitment as a dangerous sex offender—the judge may, at sentencing, determine if the person is a "sexually violent predator." NEB. REV. STAT. § 29-4005(3)(a) (Cum. Supp. 2006). "Sexually violent predator[s]" are defined as persons

> who [have] been convicted of one or more registrable offenses . . . and who suffer[ ] from a mental abnormality or personality disorder that makes the person likely to engage in sexually violent offenses directed at a stranger, or at a person with whom a relationship has been established or promoted, for the primary purpose of victimization.

Id. § 29-4005(4)(c). If the judge determines that the person is a sexually violent predator, the person must register as a sex offender for the rest of his life and verify that registration on a quarterly basis. *Id.* § 29-4005(3)(b). The similarities between this definition of the term "sexually violent predator" and the criteria set forth in the Washington, Kansas, and Nebraska sex offender commitment statutes are clear. Less clear, however, is the weight, if any, that a Nebraska mental health board will afford to a judge's "sexually violent predator" finding as it conducts proceedings to determine whether the "sexually violent predator" must be committed as a dangerous sex offender under the Sex Offender Commitment Act.

294. *See supra* Part II.

for their violations of the law from those who are not responsible by virtue of their psychological impairments.

This Part will describe the basic interrelationship between criminal responsibility and psychological impairment in the American legal system and illustrate the manner in which convicted sex offender commitments under the Washington, Kansas, and Nebraska statutes distort this interrelationship. First, the Supreme Court's test for determining whether a commitment scheme is civil or criminal in nature will be briefly restated. Next, an alternate analytical framework based upon the concept of "condemnation" will be described. Condemnation will be thoroughly defined, and the role of condemnation within the basic institutions of criminal punishment and civil commitment will be outlined in order to illustrate the difference in the functions that those institutions are intended to perform. Finally, convicted sex offender commitments will be examined through the lens of condemnation, and it will be argued that these commitments distort the relationship between criminal responsibility and psychological impairment in a manner that raises doubts about the "civil" nature of these commitments.

A. The *Ward* Analysis and the *Kennedy* Factors: Deferring to Legislative Intent Without an Operational Definition of Punishment

As explained above, courts that have been tasked with determining whether convicted sex offender commitments are civil or criminal in nature have applied the two-part test described in *United States v. Ward*.[295] The test is highly deferential to the legislature: if it appears that the legislature intended to establish a civil proceeding by, for instance, placing the commitment statute in the state's civil code, a court will ordinarily defer to the legislature's intent.[296] Indeed, the court "will reject the legislature's manifest intent only where a party challenging the statute provides 'the clearest proof' that 'the statutory scheme [is] so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'"[297] This "clearest proof" might be based upon an argument that the statute promotes "the traditional

295. 448 U.S. 242, 248–49 (1980). *See, e.g.*, Seling v. Young, 531 U.S. 250, 261 (2001); Kansas v. Hendricks, 521 U.S. 346, 361 (1997). Other tests that have been employed to determine whether various sex offender laws are civil or criminal are outlined and criticized in Note, *Prevention Versus Punishment: Toward a Principled Distinction in the Restraint of Released Sex Offenders*, 109 HARV. L. REV. 1711, 1717–25 (1996). The note's author suggests that a principled classification of sex offender statutes would be based first upon an evaluation of "the nature of the disability imposed" by the statute, and second upon a determination "whether the statute has retributive or general deterrent effects." *Id.* at 1726.

296. *E.g.*, *Hendricks*, 521 U.S. at 361.

297. *Id.* (quoting *Ward*, 448 U.S. at 248–49 (1980)).

aims of punishment—retribution and deterrence," or, perhaps, an argument that other factors set forth in *Kennedy v. Mendoza-Martinez* weigh in favor of a finding that the state's intention should be disregarded.[298] However, a court will not evaluate the nature of a statute "by reference to the effect that [statute] has on a single individual."[299] Also, after a statute has been determined to be civil, individuals cannot complete "an end run" around that determination by bringing an "as-applied" challenge to the statute's civil nature.[300]

This analytical framework allows courts to attempt to distinguish between civil and criminal dispositions without deferring completely to the legislature; however, it does so without articulating a basic definition of punishment.[301] The following sections of this Article propose that a defining characteristic of punishment—its expressive function—can help clarify the distinction between civil and criminal dispositions generally and illustrate the specific classification difficulties presented by convicted sex offender commitment statutes.

B. Condemnation: The Expressive Function of Punishment

The distinction between civil sanctions and criminal punishment has been explored extensively by scholars, yet remains elusive.[302] As the foregoing section of this Article illustrated, courts consider the functions performed by a particular deprivation of liberty in order to determine whether that deprivation is truly civil or criminal in nature:[303] If a deprivation of liberty serves retributive or deterrent functions, it may be deemed criminal.[304] On the other hand, if it performs different functions—such as "restrict[ing] the freedom of the dangerously mentally ill" in order to protect the public—a deprivation of liberty may be deemed civil.[305]

298. Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963). *See also Hendricks*, 521 U.S. at 362 (explaining that the presence or lack of a scienter requirement may be one factor courts look at in determining if a statute is civil or criminal (citing *Kennedy*, 372 U.S. at 168)); Young v. Weston, 898 F. Supp. 744, 751–52 (W.D. Wash. 1995) (same); *In re* Young, 857 P.2d 989, 997–98 (Wash. 1993) (same).

299. *Seling*, 531 U.S. at 262.

300. *Id.* at 263.

301. *See* Stephen R. McAllister, *"Punishing" Sex Offenders*, 46 U. KAN. L. REV. 27, 56–57 (1997).

302. *See* Joel Feinberg, *The Expressive Function of Punishment, in* PHILOSOPHY OF LAW 592, 592–93 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995).

303. United States v. Ward, 448 U.S. 242, 248–49 ("[W]here Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so *punitive either in purpose or effect* as to negate that intention." (emphasis added)).

304. *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997); United States v. Halper, 490 U.S. 435, 448 (1989).

305. *Hendricks*, 521 U.S. at 363.

In addition to retributive and deterrent functions, criminal punishment also serves an *expressive function*; that is, it has a special "symbolic significance."[306] Specifically, it has been argued that "[p]unishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those 'in whose name' the punishment is inflicted."[307] This "fusing of resentment and reprobation," where "resentment" refers to "vengeful attitudes" and "reprobation" to disapproving judgment distinct from the emotionally rooted resentment, has been labeled "*condemnation*."[308] Punishment ordinarily expresses condemnation, while civil sanctions do not.[309]

The relationship among the concepts of condemnation, retribution, and revenge is subtle; indeed, an alternate definition of condemnation can be developed from a careful examination of the concepts of revenge and retribution. Retribution is arguably distinguishable from revenge in part because retribution occurs only in response to wrongs, whereas revenge may be undertaken in response to a harm which might not be a wrong.[310] Retribution is also distinguishable in that the extent of a retributive response to a wrong is limited by the seriousness of the wrong, while the limits of revenge are not intrinsically bounded.[311] In other words, a retributive response is proportional to the wrong, while a revenger indulges the limits of his preferences as he responds to a harm against him. A third basis for distinguishing retribution from revenge might be based upon the notion of a special attachment between a revenger and the victim of a harm. Arguably, revenge requires a special, possibly personal connection to the victim of a harm, while retribution may be carried out by an agent who has no special tie to the victim.[312] These three bases for distinguishing revenge and retribution are not intended to be exhaustive, but merely illustrative.[313] For present purposes, it is sufficient that a retributive

306. Feinberg, *supra* note 302, at 593.

307. *Id.*

308. *Id.* at 594.

309. *Id.* at 593.

310. Robert Nozick, *Retribution and Revenge, in* PHILOSOPHY OF LAW, *supra* note 302, at 675. A brief hypothetical helps illustrate the difference between a "harm" and a "wrong" as those terms relate to the concepts of revenge and retribution. Consider an organized crime leader, or "boss," who decides to hurt an individual for testifying against the boss at trial. The crime boss can be said to be seeking revenge because he was harmed by the witness's testimony. However, since the act of testifying is not a wrong, he cannot be said to be seeking retribution in its technical sense.

311. *Id.*

312. *Id.*

313. It has also been argued that revenge is characterized by "a particular emotional tone" that need not be present with retribution and that a revenger is not com-

response to an act may be defined as one that is triggered by a wrong, is proportional to that wrong, and may or may not involve a special tie to the person affected by the wrong. In contrast, a vengeful response to an act is triggered by a harm which may or may not be a wrong, need not be limited by notions of proportionality, and involves a special tie to the person affected by the act.

Note that it is possible for a response to qualify as both retribution *and* revenge if the response is proportional to a wrong and involves a special tie to the affected person, and recall that condemnation has been said to consist of a "fusing of resentment and reprobation."[314] If, as noted above, "resentment" is the emotional force that motivates revenge,[315] and "reprobation" is the "disapproving judgment" that limits vengeful passions and legitimates retributive responses,[316] condemnation amounts to an expression of "retributive revenge," which consists of those responses which qualify as both retribution and revenge. Since criminal punishment generally expresses condemnation, the foregoing analysis suggests that criminal punishment can express a certain vengefulness, but only to the extent that this vengefulness is consistent with, or bounded by, retribution.

In sum, criminal punishment can be distinguished from civil deprivations of liberty or property by its expressive function; that is, criminal punishment serves as the conventional means of expressing attitudes of resentment fused with rational, disapproving judgment on behalf of the State or its citizens. This fusion of attitudes and judgments, which has the characteristics of "retributive revenge," is termed "condemnation."

To the extent that condemnation can be used to distinguish civil deprivations of liberty from criminal punishment, it might be used as an alternative or supplement to the analysis that courts traditionally undertake when tasked with drawing such a distinction. The sections that follow describe the manner in which condemnation is expressed through the American criminal justice system and illustrate that civil commitments are not intended to express condemnation toward committed persons, even when those persons violate criminal laws. It is argued that the expressive function of punishment does indeed distinguish criminal convictions from ordinary civil commitments, and that its ability to do so lies in the relationship between condemnation and the capacity for criminal responsibility.

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mitted to seeking revenge in every instance, whereas those who act in retribution must be committed to imposing similar punishments across similar circumstances. *Id.* at 676.

314. Feinberg, *supra* note 302, at 594.

315. *Id.*

316. *Id.*

C. Condemnation and the Capacity for Criminal Responsibility[317]

A traditional requirement for the imposition of punishment is accountability, or the psychological capacity required for criminal responsibility.[318] It follows, therefore, that however society deems to treat persons who violate its criminal laws while lacking this capacity, that treatment should not amount to punishment. In view of this fact, if condemnation is to serve as a useful basis for analyzing the distinction between civil and criminal dispositions, the relationship between condemnation and the capacity for criminal responsibility must be closely examined. A description of the various senses in which condemnation is expressed by the American criminal justice system will help to clarify this relationship.[319]

For the purposes of this Article, it is necessary to analyze four types of condemnation that, it has been argued, are expressed by the criminal justice system.[320] First, condemnation is expressed when a social institution proscribes a certain category of conduct.[321] This commonly occurs when a legislature defines a particular crime and sets its punishment.[322] For example, if a legislature criminalizes "fornication,"[323] a degree of condemnation is thereby expressed toward the category of conduct that satisfies the statute's definition of fornication. This sort of condemnation will be referred to hereinafter as condemnation type one.

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317. As used here, the notion of "capacity for criminal responsibility" is intended to refer to the psychological capacities relevant to the determination that an actor was "competent" to commit a crime. *See* Robert F. Schopp, *Civil Commitment and Sexual Predators: Competence and Condemnation*, 4 PSYCHOL. PUB. POL'Y & L. 323, 355 (1998). In jurisdictions with an insanity defense, these capacities would be evaluated using the standard set forth in the insanity-defense statute. In other jurisdictions, these capacities would be evaluated against the concept of mens rea. *See, e.g.*, State v. McDougall, 749 P.2d 1025, 1027 (Idaho Ct. App. 1988) ("Although eliminating affirmative defenses based upon the defendant's mental condition, the statute does not relieve the state of its burden of proving beyond a reasonable doubt every fact necessary to constitute the crime charged. In every crime or public offense there still must exist either a union of act and intent, or criminal negligence." (citations omitted)).

318. *See, e.g.*, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1521–24 (1992); RICHARD G. SINGER & MARTIN R. GARDNER, CRIMES AND PUNISHMENT: CASES, MATERIALS AND READINGS IN CRIMINAL LAW 854–64 (1989).

319. *See* Robert F. Schopp, *Justification Defenses and Just Convictions*, 24 PAC. L. J. 1233, 1258–62 (1993).

320. *Id.* at 1258–61.

321. *Id.* at 1259–60.

322. *See id.* at 1261.

323. *See* Traci Shallbetter Stratton, *No More Messing Around: Substantive Due Process Challenges to State Laws Prohibiting Fornication*, 73 WASH. L. REV. 767, 767 n.1, 769–70 (1998) (reporting that fornication, or the act of sexual intercourse between unmarried partners, was prohibited in all but ten states in 1965).

Condemnation type two accompanies an affirmation of an institutional proscription.[324] Such an affirmation typically occurs when an institutional proscription is enforced. For example, if "fornication" has been criminalized, but the state's fornication statute is not enforced by the police, there has been an expression of condemnation of type one, but not type two, towards the category of conduct labeled "fornication."[325]

Condemnation type three is expressed when the proscription of a particular institutionally proscribed act is affirmed upon the consideration of the specific circumstances of its commission.[326] This type of condemnation is fact-specific and indicates that the commission of a proscribed act was not justified in a particular instance.[327] For example, if a state has criminalized conduct defined as "the intentional killing of another person," and if this prohibition is enforced, then the category of conduct defined as "the intentional killing of another person" is the subject of condemnation types one and two. If, however, the intentional killing in a particular case were determined to have been justified—perhaps because it occurred as a result of self defense—condemnation type three would not be expressed toward this specific act of intentional killing.

Finally, condemnation type four is expressed toward a fully accountable agent who has committed an institutionally proscribed act.[328] To illustrate, suppose that conduct defined as "the intentional killing of another person" is institutionally proscribed and that this institutional proscription is enforced when intentional killings occur. Suppose further that an intentional killing of another person has occurred, and that it was not justified. Thus, condemnation of types one, two, and three are expressed toward the killing. Condemnation of type four will be expressed toward the person who committed the intentional killing if it is determined that this person was a fully accountable actor at the time of the killing. If, however, it is found that the person lacked accountability for the act—say, for example, due to a psychological impairment that rendered him legally insane—then condemnation type four would not be expressed toward him. It should be noted that condemnation types one through three are expressed toward a *category of behavior* or a specific *act* that falls within that

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324. Schopp, *supra* note 319, at 1260, 1262–63.

325. *Id.* at 1262–63.

326. *Id.* at 1260.

327. *See id.*

328. *Id.* at 1260–61. Schopp has identified a fifth type of condemnation, which is based on the moral blameworthiness of the actor. *Id.* at 1261–62. This type of condemnation is not directly relevant to the present analysis, and therefore it is not discussed in this Article.

category, but the fourth type extends condemnation to the *actor* as a fully accountable moral agent.[329]

When a person commits a criminally proscribed act and is apprehended by the authorities, charged, tried, convicted, and sentenced, condemnation of types one through four will be expressed.[330] At minimum, however, whenever punishment is imposed under the American criminal justice system, condemnation types one and four are expressed:[331] The principle of legality[332] results in an expression of condemnation type one in all cases where punishment is imposed,[333] and condemnation type four inheres in criminal punishment because, as is the case in any minimally retributive criminal justice system,[334] a determination of "accountability by systemic standards [is] a necessary condition for conviction and punishment."[335]

In sum, it has been argued that condemnation is expressed by the criminal justice system generally and by the system's application in specific cases. However, the system imposes punishment upon, and expresses condemnation toward, only those persons who are found to have performed institutionally proscribed acts while acting as criminally responsible, accountable actors. As will be explained below, a separate and, in some ways, complimentary institution may subject

329. *See id.* at 1261–62.

330. *See id.* at 1264.

331. *Id.* at 1263–64. Condemnation types two and three are not necessarily expressed in every case when criminal punishment is imposed. Note that condemnation of type two would not be expressed in a case where the criminal code diverges from conventional notions of morality such that jurors do not wish to affirm the institutional proscription of the prohibited act, but nevertheless convict the defendant based upon their acceptance of their duty to apply the law as instructed. *Id.* at 1262–64. Similarly, condemnation of type three would not be expressed in a case where jurors affirm the systemic condemnation of an act generally, "deny that this particular instance of that type [of act] merits condemnation," but nevertheless convict the defendant to satisfy their oath to apply the law. *Id.* at 1262.

332. A discussion of the principle of legality, which is based on the notion that there be no punishment without law, may be found in SINGER & GARDNER, *supra* note 318, at 169–90.

333. *See* Schopp, *supra* note 319, at 1263 ("[T]he first type, involving condemnation at the institutional level of the general category of conduct, inheres in any institution of criminal punishment because the criminal justice system represents the official conventional social morality for the society in which it is embedded.").

334. Here, "minimally retributive" is meant to suggest a system wherein a conviction and punishment must be conditioned "on retributive requirements of guilt, culpability, responsibility, or desert." *Id. See also* Schopp, *supra* note 317, at 336–37 (noting that minimally retributive criminal justice systems, such as that of the United States, "limit criminal responsibility to those who deserve punishment by virtue of violating an offense definition while meeting systemic criteria of culpability"). In contrast, in a purely utilitarian system of criminal justice, it would be possible to convict and punish a person who was not responsible for a given criminal act, if doing so would maximize the overall benefits to society.

335. Schopp, *supra* note 319, at 1263–64. *See also supra* note 317 (discussing the idea of "capacity for criminal responsibility").

persons who lack criminal accountability to nonpunitive deprivations of liberty.

D. Condemnation and Ordinary Police Power Civil Commitments

The state exercises its police power, or its "authority to wield coercive force in order to protect the community from harm,"[336] when it punishes criminals. It may also exercise this power when it civilly commits persons who suffer from psychological impairments that render them dangerous.[337] Since criminal and civil deprivations of liberty can both be based upon a state's police powers, it follows that there is some overlap in the functions that these deprivations of liberty perform. For example, criminal sentences and civil commitments may each legitimately serve the function of incapacitation.[338] Nevertheless, this overlap is certainly not complete; indeed, the Supreme Court has suggested that if a civil deprivation of liberty performs retributive and deterrent functions, it ought to be considered criminal in nature.[339] However, the Court has not clearly articulated the reasons why civil commitments cannot serve retributive and deterrent purposes. This section presents an argument that the condemnation framework set forth above can, when considered along with the traditional justifications for police power civil commitments, illustrate these reasons.

The criminal justice system, which is administered by a state pursuant to its police power, serves "as the primary legal institution of coercive social control over adult citizens who engage in culpable conduct that harms the legitimate interests of others."[340] In other words, the criminal justice system, with its associated rights and rules, is, at

336. Schopp, *supra* note 317, at 332; ROBERT F. SCHOPP, COMPETENCE, CONDEMNATION, AND COMMITMENT 17 (2001).

337. Kansas v. Hendricks, 521 U.S. 346, 372 (1997) (Kennedy, J., concurring) ("As all Members of the Court seem to agree, then, the power of the State to confine persons who, by reason of a mental disease or mental abnormality, constitute a real, continuing, and serious danger to society is well established." (citing Addington v. Texas, 441 U.S. 418, 426–27 (1979))); Schopp, *supra* note 317, at 332–33. Civil commitments may also be based upon a state's *parens patriae* power, which allows the state to exert authority over citizens who lack the capacity to care for themselves. *See Addington*, 441 U.S. at 426; Schopp, *supra* note 317, at 332–33. The specific uses of these commitments and their legal contours are not relevant to the analysis presented here, and in this Article the term "civil commitment" should be understood to refer to civil commitments based upon a state's police power.

338. *See, e.g.*, *Hendricks*, 521 U.S. at 373 (Kennedy, J., concurring).

339. *See id.* at 361–62 (majority opinion); *id.* at 373 (Kennedy, J., concurring) ("[R]etribution and general deterrence are reserved for the criminal system alone.").

340. SCHOPP, *supra* note 336, at 17.

least in the United States (and other countries that respect the standing of accountable agents), the conventional institution for imposing legal punishment.[341] As explained in the previous section of this Article, when criminal punishment is imposed there will typically be an institutional proscription of a category of conduct, an affirmation of that general proscription, a determination that a particular act that falls within that category is not justified, and a determination that the person who committed the particular act is a criminally responsible actor.[342] The criminal justice system is designed to identify proscribed conduct and provide an institutional framework for the determinations that ordinarily precede the imposition of punishment. That is, the criminal code publishes the institutional proscriptions; the police force, prosecutors, judges, and jurors determine whether to affirm the general proscriptions; and, in criminal trials, judges or jurors determine whether the proscription of a particular act should be affirmed in the specific case before them and whether the actor committed the act as a responsible agent. Criminal punishment may follow when each of these steps has been satisfied; before punishment may be imposed, however, there must at least be an institutional proscription of a category of conduct and an institutional determination that a person committed an act that falls within that category while acting as an accountable moral agent.[343] This punishment, in turn, can serve retributive, deterrent, and special expressive functions. It follows that, conversely, without a determination that the accused is an accountable agent, criminal punishment cannot follow, no retributive or deterrent[344] goals would be served if he were otherwise institu-

341. *See* Schopp, *supra* note 319, at 1259.

342. *See supra* section IV.C.

343. *See supra* section IV.C.

344. This is not to say that people who lack the capacity to act as accountable agents cannot be "deterred" in any sense of the term. Indeed, it might be said that trained animals are "deterred" from performing forbidden acts. Yet the Supreme Court has stated specifically that commitment under the Kansas Sexually Violent Predator Act "does not implicate . . . deterrence." *Hendricks*, 521 U.S. at 361–62. *See also id.* at 373 (Kennedy, J., concurring) ("We should bear in mind that while incapacitation is a goal common to both the criminal and civil systems of confinement, retribution and general deterrence are reserved for the criminal system alone."). It is doubtful that the Court means to suggest that persons cannot be civilly committed if they can be deterred in the same sense as a trained animal, or that this sort of deterrence is "reserved for the criminal system alone." For the purposes of this Article—and, arguably, for the Supreme Court's analysis in *Hendricks*—"deterrence" refers to something more than a mere conditioned response, and its functioning depends upon the actor's capacity for criminal responsibility. More specifically, "deterrence" (as the term is used here) is a goal served only by the criminal justice system because it is reserved for those people who have the capability of refraining from criminal conduct through the exercise of the psychological capacities relevant to criminal responsibility.

tionally incapacitated, and no condemnation would be expressed toward him by such an incapacitation.

Civil commitments may also be based upon a state's police powers, and, as will be explained below, they may be imposed through the criminal justice system. Typically, however, civil commitments are imposed via the operation of institutions separate and distinct from the criminal justice system. These civil commitment institutions, which vary in their particulars from state to state, may differ from the criminal justice system in several key respects. Certain rights that must be afforded in criminal proceedings are not implicated when civil commitments stem from a state's conventional civil commitment institution,[345] and institutions of civil commitment may employ different rules and procedures than those required in criminal proceedings. For example, civil commitments under Nebraska's Mental Health Commitment Act are based upon "clear and convincing" evidence, as opposed to a standard of proof "beyond a reasonable doubt," and the commitment decision is made by a mental health board, as opposed to a jury.[346] These differences between criminal proceedings and civil commitment proceedings are not problematic because states' civil commitment statutes are neither designed nor intended to result in the imposition of criminal punishment.[347] Instead, their purpose "is to treat [an] individual's mental illness and protect him and society from his potential dangerousness."[348] To achieve this purpose while protecting individuals' core substantive due process interests in freedom from bodily restraint, civil commitments imposed under a state's ordinary civil commitment statutes are generally held to be constitutionally valid when there has been an institutional determination—based upon at least clear and convincing evidence—that a person suffers from a particular type of psychological impairment that renders him dangerous.[349] In Nebraska, the requisite psychological impair-

345. United States v. Ward, 448 U.S. 242, 248 (1980) ("The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to 'any criminal case.' Similarly, the protections provided by the Sixth Amendment are available only in 'criminal prosecutions.' Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court. *See, e.g.*, Helvering v. Mitchell, 303 U.S. 391, 399 (1938) (Double Jeopardy Clause protects only against two criminal punishments); United States v. Regan 232 U.S. 37, 47–48 (1914) (proof beyond a reasonable doubt required only in criminal cases).").

346. *See* NEB. REV. STAT. § 71-925 (Cum. Supp. 2006).

347. *See* Addington v. Texas, 441 U.S. 418, 428 (1979).

348. Jones v. United States, 463 U.S. 354, 368 (1983).

349. *See, e.g.*, Kansas v. Crane, 534 U.S. 407, 409–10 (2002) ("'We have consistently upheld such involuntary commitment statutes' when (1) 'the confinement takes place pursuant to proper procedures and evidentiary standards,' (2) there is a finding of 'dangerousness either to one's self or to others,' and (3) proof of dangerousness is 'coupled . . . with the proof of some additional factor, such as a "mental illness" or "mental abnormality."'" (quoting Kansas v. Hendricks, 521 U.S. 346,

ment is defined as "a psychiatric disorder that involves a severe or substantial impairment of a person's thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with such person's ability to meet the ordinary demands of living or interferes with the safety or well-being of others," and dangerousness is demonstrated when a person, because of this disorder, presents "[a] substantial risk of serious harm to another person or persons within the near future."[350] If these criteria are satisfied and a civil commitment is ordered, it may be said that the commitment bears a "reasonable relation" to the goals of treating psychological impairments while protecting society from danger.[351] In other words, the involuntary civil commitment is justified by the presence of a qualifying psychological impairment and evidence of dangerousness attributable to that impairment. However, if either criterion ceases to be satisfied, the justification for the commitment dissolves and the person can no longer be held involuntarily.[352]

Note that the justification for civil commitments does not depend upon the commission of an institutionally proscribed act by an accountable agent. In the language of the condemnation framework outlined above, it might be said that unlike criminal punishment, civil commitments may occur in the absence of condemnation types one and four. This is consistent with civil commitment's nonpunitive institutional purpose of protecting the public from the dangerous mentally ill; indeed, it suggests that civil commitments are not punitive, and, therefore, they do not, and cannot, promote the goals of retribution and deterrence.

Although civil commitments do not depend upon the commission of institutionally proscribed acts, it does not follow that civil commitments cannot occur when the subject of the commitment has committed an institutionally proscribed act. On the contrary, civil commitments based on determinations that defendants are incompetent to proceed or legally insane may flow directly from the criminal justice system; that is, they may be imposed at the conclusion of criminal proceedings as opposed to proceedings under the standard civil

357–58 (1997))); Foucha v. Louisiana, 504 U.S. 71, 80 (1992). *But see* Schopp, *supra* note 317, at 328–30 (arguing that the cases relied upon by the Court in *Foucha* fail to establish that civil commitments require mental illness and dangerousness).

350. NEB. REV. STAT. §§ 71-907, 71-908(1) (Cum. Supp. 2006). *See also id.* § 71-902 ("The purpose of the Nebraska Mental Health Commitment Act is to provide for the treatment of persons who are mentally ill and dangerous.").

351. *Foucha*, 504 U.S. at 79. Indeed, "[d]ue process requires that the nature of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.* (citing Jones v. United States, 463 U.S. 354, 368 (1983); Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

352. *Id.* at 77–79.

commitment statute.[353] Although these commitments have been held to be consistent with the "reasonable relationship" principle and, therefore, are consistent with principles of due process,[354] their civil nature is also illustrated effectively by the four-level condemnation framework.

Suppose that a person commits an institutionally proscribed act—say, a sexual assault—but it is determined that the person lacks competence to proceed to trial. Suppose too that as a direct result of his incompetence to proceed, he is civilly committed.[355] If one were to question whether this commitment is truly civil, as opposed to criminal, in nature, one might focus upon the function performed by the commitment and determine that it is indeed "civil."[356] Alternately, one might apply the condemnation framework and determine that, in fact, the commitment *must* be civil in nature. In this example, an expression of condemnation type one is associated with the proscription of the relevant category of conduct (i.e., sexual assaults in general), and it might be assumed that, based upon the affirmation of the institutional proscription of sexual assaults reflected in the decision to prosecute the alleged offender, there has been an expression of condemnation type two. However, owing to the defendant's incompetence to proceed in the criminal justice system, the defendant's particular sexual assault cannot be evaluated by the criminal justice system to determine whether it merits condemnation (of type three); nor can there be a determination that the defendant committed his sexual assault as an accountable agent, which is a prerequisite for an expression of condemnation (type four) towards the actor himself. In sum, even though the defendant may have committed an institutionally proscribed act, and even though his commitment was imposed under the criminal justice system (as opposed to the state's ordinary civil commitment institutions), the defendant's commitment cannot ex-

353. *See Jones*, 463 U.S. at 366; *Jackson*, 406 U.S. at 738.

354. *Jones*, 463 U.S. at 366; *Jackson*, 406 U.S. at 738.

355. The Supreme Court has held that the state may civilly commit a person based solely on his incompetence to proceed, although the duration of the commitment is limited to "the reasonable period of time necessary to determine whether there is a substantial probability that [the person] will attain [the] capacity [to proceed] in the foreseeable future." *Jackson*, 406 U.S. at 738. If it is found that there is no substantial probability that the person will attain that capacity in the foreseeable future, the person's confinement can continue only if he is committed pursuant to "the customary civil commitment" statute. *Id.* On the other hand, if it is determined that the person soon may be able to proceed to trial, "his continued commitment must be justified by progress toward that goal." *Id. See also* NEB. REV. STAT. § 29-1823(1) (Cum. Supp. 2006) ("Should the district judge determine after a hearing that the accused is mentally incompetent to stand trial and that there is a substantial probability that the accused will become competent within the foreseeable future, the district judge shall order the accused to be committed . . . until such time as the disability may be removed.").

356. *See Jackson*, 406 U.S. at 738.

press condemnation—nor can it be deemed criminal or punitive in nature—because there has been no determination that the individual committed an act of an institutionally proscribed type while acting as an accountable agent.

Similarly, suppose that a person commits a sexual assault, but he successfully raises an insanity defense during his criminal prosecution. Thereafter, based solely upon the defendant's legal insanity, the state civilly commits him.[357] In this case, as in the case described immediately above, there has been an expression of condemnation type one and, it may be assumed, an expression of condemnation type two toward the category of conduct defined as "sexual assault." In addition, given the affirmative nature of the insanity defense, it is arguable that an insanity acquittal results in at least an implicit determination that the specific sexual assault committed by the defendant merits condemnation (of type three).[358] Thus, there may be an expression of condemnation types one, two, and three. Nevertheless, the post-insanity acquittal commitment does not express condemnation toward the defendant because it is not based upon a determination that the defendant committed the proscribed act while acting as

357. *See Jones*, 463 U.S. at 366, 370. In Nebraska, however, insanity acquittals do not automatically result in civil commitments:

> Nebraska statutes provide for special procedures in the case of persons acquitted of a crime on grounds of insanity. When an individual is acquitted on these grounds, a hearing is held to determine "whether there is probable cause to believe the person is dangerous to himself, herself, or others by reason of mental illness or defect, or will be so dangerous in the foreseeable future, as demonstrated by an overt act or threat." § 29-3701(1). If the court finds probable cause, the individual may be committed to a regional center or other facility for up to a 90-day evaluation period, during which a treatment plan is developed. The court shall specify all conditions of the individual's confinement during this period.
>
> Before the end of the evaluation period, the court shall conduct an evidentiary hearing regarding the person's condition, and if the evidence is clear and convincing that the person is dangerous, the court shall commit the person for treatment to one of the regional centers or other appropriate facility. § 29-3702. The statute calls for an annual review by the original trial court of the individual's status, and if it is found that the individual is no longer dangerous, the court shall order the individual unconditionally released. § 29-3703. If continued dangerousness is found, the person may be returned for further treatment and may be placed in a less restrictive setting if that placement is consistent with public safety. § 29-3703(2). The individual is entitled to counsel and other constitutional rights for each hearing conducted under the statute. § 29-3704.

Tulloch v. State, 237 Neb. 138, 140–41, 465 N.W.2d 448, 451 (1991).

358. "A verdict of not guilty by reason of insanity establishes two facts: (i) *the defendant committed an act that constitutes a criminal offense*, and (ii) he committed the act because of mental illness." *Jones*, 463 U.S. at 363 (emphasis added).

an accountable agent.[359] Indeed, the successful insanity defense precluded a determination that condemnation of type four is appropriately expressed toward the *individual*, even though the proscription of the defendant's *specific act* may have been affirmed during the criminal proceedings.

Note also that a person may be convicted of a crime and, after he has fully served a prison sentence, civilly committed—provided that the civil commitment criteria are satisfied.[360] For example, a person who has been convicted of a sexual assault may, during his prison sentence, develop a psychological impairment that satisfies the "mental illness" prong of a state's civil commitment statute and renders him dangerous within the meaning of the statute. If he is then civilly committed upon the expiration of his sentence, it does not follow that his civil commitment expresses condemnation toward him—even though the criminal justice system has determined that the person is an appropriate subject of condemnation. This is so because the post-sentence commitment is based upon the statutory commitment criteria, not upon the fact that the defendant was found to be criminally responsible for a sexual assault. If, however, the standard commitment criteria are not satisfied, and the person is nevertheless civilly committed upon the completion of his criminal sentence, his commitment would be subject to challenge on the ground that there is no reasonable basis for treating him differently from persons who are civilly committed under the standard statute.[361]

In sum, although civil commitments may be based upon a state's police power, they are not designed to impose punishment, and therefore they do not serve retributive or deterrent functions. Instead, states' civil commitment statutes establish institutions that are designed to confine persons with statutorily defined psychological impairments that render them dangerous. Principles of due process "require[ ] that the nature and duration of [a] commitment bear some

359. Instead, the commitment is based upon "the purposes of treatment and the protection of society," *id.* at 366, as are ordinary civil commitments, *id.* at 368.

360. *See, e.g.*, Baxstrom v. Herold, 383 U.S. 107, 110–12 (1966). In *Baxstrom*, the Court held that persons may not be civilly committed at the expiration of their criminal sentences "without the jury review available to all other persons civilly committed in New York." *Id.* at 110. The Court rejected the argument that the State "created a reasonable classification differentiating the civilly insane from the 'criminally insane'" that would justify differential treatment for persons nearing the end of prison sentences, stating,

> Classification of mentally ill persons as either insane or dangerously insane of course may be a reasonable distinction for purposes of determining the type of custodial or medical care to be given, but it has no relevance whatever in the context of the opportunity to show whether a person is mentally ill *at all*.

Id. at 111.

361. *See id.* at 110–12.

reasonable relation to the purpose for which the individual is committed,"[362] and these principles may be satisfied in cases where individuals are committed following determinations that they are incompetent to proceed to trial or are not guilty by reason of insanity, even if proceedings under the standard civil commitment statute do not occur. The condemnation framework outlined above illustrates that civil commitments do not express condemnation—and are not punitive—even when civil commitments flow directly from criminal proceedings.

The relationship between condemnation, criminal punishment, and civil commitment described above is not meant to account for all of the intimate workings of the entire criminal justice system, let alone all of the particular variations in states' civil commitment statutes.[363] However, it is consistent with the *basic* institutions of criminal punishment and civil commitment in the United States. It will be argued next that convicted sex offender commitments distort the conventional functions of these institutions due to the ambiguous expressive function that they perform.

E. The Expressive Function of Convicted Sex Offender Commitments

Courts' differing views about the functions performed by convicted sex offender commitments were summarized above in Part II. To refresh, the United States District Court for the Western District of Washington found that these commitments "promote the traditional aims of punishment—retribution and deterrence,"[364] while the Washington Supreme Court and the United States Supreme Court reached the opposite conclusion.[365] The courts also disagreed whether the commitment criteria satisfied substantive due process requirements.[366] The Nebraska Sex Offender Commitment Act appears to raise the same controversial questions about the civil nature of convicted sex offender commitments and the substantive due process

362. Jackson v. Indiana, 406 U.S. 715, 738 (1972).

363. For a much more thorough study of this relationship, generally see SCHOPP, *supra* note 336; and Schopp, *supra* note 317.

364. Young v. Weston, 898 F. Supp. 744, 752 (W.D. Wash. 1995). *See also In re* Hendricks, 912 P.2d 129, 136 (Kan. 1996) (finding the Kansas act's primary purpose was "to continue incarceration and not to provide treatment").

365. *See* Kansas v. Hendricks, 521 U.S. 346, 361–62 (1997); *In re* Young, 857 P.2d 989, 998–99 (Wash. 1993).

366. *Compare Young*, 898 F. Supp. at 748–51 (concluding that the statutes' commitment criteria violate substantive due process rights because they allow for "the indefinite confinement of persons who are not mentally ill"), *and In re Hendricks*, 912 P.2d at 136–38 (indefinite confinement of person who is not mentally ill violates the Constitution), *with Hendricks*, 521 U.S. at 356–58, *and In re Young*, 857 P.2d at 998–1009 (finding that "the Statute does not violate substantive due process" because it "conditions civil commitment on a finding of both a mental disorder and dangerousness").

rights of committed persons.[367] This section presents the argument that an analysis of the expressive function of convicted sex offender commitments[368] using the four-level condemnation framework can help to explain why courts reach opposite conclusions on each of these issues. In addition, the condemnation framework illustrates that the two main issues of contention are not as independent as the courts' analyses might suggest. It is further argued that an analysis of the expressive function of convicted sex offender commitments reveals that these commitments distort the functions that are ordinarily performed by the institution of civil commitment by blurring them with the traditional functions of the criminal justice system, while simultaneously diluting the expression of condemnation that inheres in criminal punishment.

Recall that an institutional disposition amounts to punishment if it is based upon a determination that an institutionally proscribed act has been committed by a criminally responsible actor.[369] Recall also that the institutional proscription of a category of conduct and the institutional determination that the actor was criminally responsible when he committed the act express condemnation of types one and four, respectively. Assume that a man named Andy has been convicted of the offense of rape and has been sentenced to serve a prison term. Since there has been an expression of condemnation type one (by virtue of the institutional proscription of rape as a category of conduct) and type four (by virtue of the determination that Andy was criminally responsible for his violation of the institutional proscription), it follows that Andy's sentence is punishment.

If Andy is subjected to a convicted sex offender commitment at the conclusion of his sentence, note that, unless the offense of rape has been deleted from the criminal code, there continues to be an expression of condemnation type one toward "rape" as a category of conduct. Therefore, if Andy's sex offender commitment is based on a determination that he acted as a criminally responsible agent when he violated that institutional proscription, the commitment expresses condemnation type four, and therefore the commitment performs the expressive function of punishment.

One might argue that Andy's sex offender commitment does not depend upon a determination that he was criminally responsible for

367. *See supra* Part III.

368. Recall that in this Article, the term "convicted sex offender commitments" is reserved for the most controversial of commitments under the Washington, Kansas, and Nebraska sex offender commitment statutes, i.e., commitments of convicted sex offenders nearing the completion of their prison sentences who do not have the sort of psychological impairment that would ordinarily subject them to civil commitment and who have not committed recent acts that demonstrate their dangerousness.

369. *See supra* section IV.C.

violating an institutional proscription, but depends instead upon evidence that he has a psychological impairment that makes him likely to commit sex offenses and seriously affects his ability to control his behavior. Indeed, this seems to be the premise underlying convicted sex offender commitments generally. However, this argument is problematic for two main reasons: there are equal protection implications that have yet to be addressed by the Supreme Court, and the nature of the psychological impairment that could justify this commitment without undermining the justification for Andy's prior conviction is mysterious. Each of these problems will be discussed below in turn.

First, it is true that civil commitments may follow on the heels of criminal sentences without substantial controversy, provided that the standard civil commitment criteria are satisfied.[370] However, convicted sex offender commitments are controversial precisely because they permit civil commitments of persons who do not satisfy the standard commitment criteria.[371] For example, suppose Andy were diagnosed with antisocial personality disorder. According to the DSM, the diagnostic criteria for antisocial personality disorder include the following:

> A. There is a pervasive pattern of disregard for and violation of the rights of others occurring since age 15 years, as indicated by three (or more) of the following:
>
> (1) failure to conform to social norms with respect to lawful behaviors as indicated by repeatedly performing acts that are grounds for arrest
> (2) deceitfulness, as indicated by repeated lying, use of aliases, or conning others for personal profit or pleasure
> (3) impulsivity or failure to plan ahead
> (4) irritability and aggressiveness, as indicated by repeated physical fights or assaults
> (5) reckless disregard for the safety of self or others
> (6) consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations
> (7) lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another[.][372]

This diagnosis would not be sufficient to support Andy's civil commitment under the Nebraska Mental Health Commitment Act, unless there is additional evidence demonstrating that his antisocial personality disorder "involves a severe or substantial impairment of [his] thought processes, sensory input, mood balance, memory, or ability to reason which substantially interferes with [his] ability to meet the or-

370. *See supra* notes 360–61 and accompanying text.

371. *See supra* section III.C.

372. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 649–50 (4th ed. 1994). Other diagnostic criteria include the following: "The individual is at least age 18 years. . . . There is evidence of Conduct Disorder . . . with onset before age 15 years. . . . [And] [t]he occurrence of antisocial behavior is not exclusively during the course of Schizophrenia or a Manic Episode." *Id.* at 650.

dinary demands of living or interferes with the safety or well-being of others."[373] Under the Sex Offender Commitment Act, however, this additional evidence would not be necessary.[374] Since convicted sex offender commitments are allowed to proceed when the standard civil commitment criteria are not satisfied, it is appropriate to question whether there is a reasonable basis for imposing different criteria on "sexually violent predators" or "dangerous sex offenders" than on others who are subject to civil commitment.[375] In *Hendricks* and *Crane*, the Supreme Court did not address this question.[376] Instead of identifying a reasonable basis for distinguishing between sex offenders worthy of commitment and other individuals worthy of commitment, the Court focused upon whether the convicted sex offender commitment criteria served to distinguish sex offenders worthy of commitment "from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[377] This is certainly a legitimate concern, and it leads to the second problem with the argument that Andy's commitment is justified by the presence of a psychological impairment: What is the nature of a psychological impairment that could justify Andy's commitment without undermining the justification for his conviction?

In *Hendricks*, the Court held that to justify a convicted sex offender commitment, there must be evidence of a psychological impairment that "serve[s] to limit involuntary civil confinement to those who suffer from a volitional impairment rendering them dangerous beyond their control."[378] The Court refined the volitional impairment concept in *Crane*, stating "that there must be proof of serious difficulty in controlling behavior," and that this serious difficulty "must be sufficient to distinguish the dangerous sexual offender whose serious mental illness, abnormality, or disorder subjects him to civil commitment from the dangerous but typical recidivist convicted in an ordinary criminal case."[379] Despite these efforts to identify the nature of the sort of mental impairment that justifies convicted sex offender commitments, the Supreme Court's conceptualization of a volitional impairment, or

373. NEB. REV. STAT. § 71-907 (Cum. Supp. 2006).

374. *See* L.B. 1199, 99th Leg., 2d Sess. § 87(1), (4) (Neb. 2006). This is not to say that antisocial personality disorder is sufficient to justify a dangerous sex offender commitment. *See id.* § 87(1).

375. *See supra* notes 370–71 and accompanying text; *see also* Baxstrom v. Herold, 383 U.S. 107, 110–12 (1966) (finding that any person who has been civilly committed at the end of a prison term must be given the same opportunity for judicial review that all other civilly committed persons receive).

376. It should be noted that the Court may not have been presented with an equal protection argument based upon *Baxstrom* in either *Hendricks* or *Crane*.

377. Kansas v. Crane, 534 U.S. 407, 412 (2002) (quoting Kansas v. Hendricks, 521 U.S. 346, 360 (1997)).

378. *Hendricks*, 521 U.S. at 358.

379. *Crane*, 534 U.S. at 413 (citing *Hendricks*, 521 U.S. at 357–58).

"serious difficulty in controlling behavior," that distinguishes persons appropriate for civil commitment from ordinary recidivists is difficult to grasp.[380] Aside from the vagueness of the concept, which the Court suggests is intentional,[381] perhaps the greatest difficulty lies in the fact that whatever the nature of a volitional impairment sufficient to justify a dangerous sex offender commitment might be, such an impairment must, in order to perform the justificatory function specified by the Supreme Court, not only serve to distinguish dangerous sex offenders from ordinary criminals, but it *must not undermine their capacity for criminal responsibility*. Since *Hendricks* provides an example of a psychological impairment that, according to the Court, suffices to justify a convicted sex offender commitment, the evidence in *Hendricks* will be used to illustrate this problem.

The Court found that "Hendricks' diagnosis as a pedophile . . . plainly suffices for due process purposes," because his "admitted lack of volitional control, coupled with a prediction of future dangerousness, adequately distinguishes [him] from other dangerous persons who are perhaps more properly dealt with exclusively through criminal proceedings."[382] Hendricks' "admitted lack of volitional control" stems from testimony that "he cannot 'control the urge' to molest children" when he is "stressed out."[383] He also testified "that the only sure way he could keep from sexually abusing children in the future was 'to die,'" even though "he hoped he would not sexually molest children again."[384] When this testimony is taken at face value—as the Court appears to have taken it—one supposes that if Hendricks were "stressed out" during his commitment hearing, he would have vaulted the witness stand and attempted to molest any child witness who appeared to testify against him, right before the eyes of the judge and jury. It is easy to accept that this sort of volitional impairment would amount to a "serious difficulty in controlling behavior" that would justify a civil commitment under the Court's rule. Note, however, that Hendricks' diagnosis of pedophilia predated his latest criminal conviction and sentence.[385] This means that an institutional determination was made that Hendricks was accountable for his sex offenses despite his volitional impairment. Yet if the volitional impairment is as severe as his credited testimony suggests, his volitional impairment would seem to undermine the finding that he was criminally responsible for his sex offenses. In other words, it is arguable that a person who cannot control his unwanted urges to molest children, which stem

380. *See* Schopp, *supra* note 317, at 341–43.
381. *See Crane*, 534 U.S. at 413–14.
382. *Hendricks*, 521 U.S. at 360.
383. *Id.*
384. *Id.* at 355.
385. *See id.* at 354–55.

from a diagnosed psychological impairment, should be civilly committed—but he is not an appropriate subject of condemnation owing to his serious volitional impairment.[386]

Returning to Andy's case, it appears that the argument that his commitment as a sex offender is civil in nature is not particularly persuasive unless it can be shown that he suffers from a psychological impairment that not only makes him likely to commit sex offenses and seriously affects his ability to control his behavior, but also manages to avoid undermining his prior conviction by calling into doubt his capacity for criminal responsibility. On the other hand, one might argue persuasively that Andy's commitment actually performs the expressive function of punishment.

Note that the primary diagnostic criteria for antisocial personality disorder are largely satisfied when a person simply engages in repeated violations of the criminal law.[387] Assume that this is true in Andy's case. Thus, this diagnosis, standing alone, probably would not serve to distinguish Andy from ordinary recidivists who ought to be dealt with exclusively by the criminal justice system.[388] As the Court instructs, there must be some additional evidence that this disorder consists "of a special and serious lack of ability to control behavior" to distinguish Andy from the ordinary recidivist.[389] Suppose that Andy does not admit, as Hendricks did, that he cannot control himself and will not stop committing sex offenses until he is killed.[390] Therefore, in order to prove that Andy has a serious difficulty in controlling his behavior, the state submits evidence that Andy has a very long history

386. Indeed, a minority of jurisdictions apply the *Model Penal Code*'s version of the insanity defense, which contains a volitional prong: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality . . . of his conduct *or to conform his conduct to the requirements of law*." MODEL PENAL CODE § 4.01(1) (Proposed Official Draft 1962) (emphasis added). A volitional impairment such as Hendricks' would likely result in a finding that he is not criminally responsible under this test. For a recently compiled list of jurisdictions that currently use the *Model Penal Code*'s definition of insanity, see Amy D. Gundlach-Evans, Note, State v. Calin: *The Paradox of the Insanity Defense and Guilty but Mentally Ill Statute, Recognizing Impairment Without Affording Treatment*, 51 S.D. L. REV. 122, 134 n.120 (2006). Washington, Kansas, and Nebraska are not among these jurisdictions. *See id.*

387. *See supra* note 372 and accompanying text. All of the criteria for antisocial personality disorder would be established if the repeat offender commits violent acts, such as rape, is eighteen years of age or older, has a history of symptoms of Conduct Disorder starting before age 15, and does not commit his offenses while suffering schizophrenia or manic episodes. *See supra* note 372 and accompanying text (specifically diagnostic criteria A(1), (4), and (5)).

388. Indeed, the Court seems to state as much. *See* Kansas v. Crane, 534 U.S. 407, 412 (2002) (citing P. Moran, *The Epidemiology of Antisocial Personality Disorder*, 34 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 231, 234 (1999)).

389. *Id.* at 412–13.

390. *Hendricks*, 521 U.S. at 355, 360.

of committing sex offenses. One might argue that such evidence could conceivably resolve the difficult problem summarized in the preceding paragraph; specifically, evidence that Andy commits sex offenses at an incredible rate would seem to support a finding that he has a psychological impairment (i.e., antisocial personality disorder) that seriously affects his ability to control his behavior, and since the impairment is based upon a "pattern of disregard for and violation of the rights of others,"[391] it is difficult to argue that the impairment undermines his capacity for criminal responsibility. However, this scenario is problematic for three reasons.

First, evidence that Andy is simply a recidivist probably will not perform the discriminatory function specified by the Court in *Crane*, because the state's proof of Andy's "serious difficulty in controlling behavior . . . must be sufficient to distinguish [him] . . . from the dangerous but typical recidivist convicted in an ordinary criminal case."[392] If the evidence submitted by the state suggests that Andy is a unique "super recidivist," however, it is at least arguable that the State's evidence will suffice.

Second, and more importantly, it appears that Andy's commitment under these circumstances would violate his substantive due process rights. To refresh, the Court has held that civil commitments are consistent with substantive due process principles if they are based upon evidence of a psychological impairment coupled with dangerousness; dangerousness alone is not sufficient to justify a civil commitment.[393] In Andy's case, however, his psychological impairment is based upon the fact that he is a repeat sex offender. His criminal history provides the foundation for his diagnosis, the finding that he has a serious difficulty controlling his behavior, and his dangerousness. Thus, it is difficult to argue that his commitment is not based solely on the dangerousness demonstrated by his past criminal conduct.[394]

Third, and relatedly, to the extent that Andy's commitment is founded upon a determination that he is a career criminal, the expressive function performed by his commitment is unclear. Indeed, arguably his commitment performs the expressive function of criminal punishment. Since the commitment is based upon evidence of Andy's past criminal behavior, it certainly seems as if it amounts to a deprivation of liberty based upon the commission of an institutionally proscribed act by an accountable agent. In other words, there is an

391. AM. PSYCHIATRIC ASS'N, *supra* note 372, at 649–50.

392. *Crane*, 534 U.S. at 413 (citing *Hendricks*, 521 U.S. at 357–58).

393. *Id.* at 409–10 (quoting *Hendricks*, 521 U.S. at 357–58); Foucha v. Louisiana, 504 U.S. 71, 80 (1992).

394. The same is true in a case where a commitment is based upon a diagnosis of "rape as paraphilia," which amounts simply to a recharacterization of criminal behavior as a psychological impairment. *See supra* subsection II.B.1.b.

expression of condemnation type one and, to the extent that the determination that Andy has a psychological impairment that seriously affects his volitional control is truly nothing other than a determination that Andy has committed a series of sex offenses as an accountable agent, the determination expresses condemnation type four. It follows then that his commitment is punitive, and that it may be said to perform retributive and deterrent functions.

In sum, the expressive function of sexual predator commitments is difficult to discern. On the one hand, if a person with prior convictions for sex offenses can be shown to have a psychological impairment that truly renders him substantially unable to control his criminal conduct, his commitment under a sex offender commitment statute seems to serve the functions that are traditionally performed by the institution of civil commitment. That is, the commitment would amount to an exercise of the state's police power to provide treatment for a serious psychological impairment while protecting the public from danger, and it would be difficult to argue that the commitment actually performs the expressive function of punishment. However, it would also be difficult to understand how the findings of criminal accountability that accompanied the person's sex offense convictions could stand in the wake of a determination that those offenses were committed by a person who was suffering from a psychological disorder that seriously impaired his volitional control. At minimum, the expressive function of those convictions would seem to be diluted. On the other hand, if the psychological impairment that justifies the commitment is based upon diagnostic criteria that are satisfied when a person simply commits a sex offense or series of sex offenses,[395] the commitment would not call into doubt the person's criminal responsibility for his prior offenses, but it would raise questions about the expressive function of the commitment. Arguably, the commitment would express condemnation toward the person because it is based essentially upon a determination that the person committed an institutionally proscribed act (or a series of such acts) as a criminally responsible actor. Under these circumstances, the commitment would be punitive, and it could legitimately serve the goals of retribution and deterrence that are ordinarily served by criminal punishment. The commitments would also be subject to double jeopardy and, perhaps, ex post facto challenges.

395. The Washington, Kansas, and Nebraska statutes' provisions indicating that personality disorders can sustain convicted sex offender commitments allow for this possibility, and if the cases discussed throughout this Article are representative of the types of impairments that are used to justify these commitments, it seems the commitments are regularly based upon impairments that are essentially "crime diagnoses." *See, e.g.*, *Crane*, 534 U.S. at 411 (exhibitionism and antisocial personality disorder); *Hendricks*, 521 U.S. at 355 (pedophilia); *In re* Young, 857 P.2d 989, 1002 (Wash. 1993) ("rape as paraphilia").

This quandary, which stems from the ambiguous nature of a psychological impairment that could justify convicted sex offender commitments without undermining criminal accountability, not only makes it difficult to identify the civil or criminal nature of these commitments, but also results in a blurring of the division of functions between the institutions of criminal justice and civil commitment. Ordinarily, it is clear that the criminal justice system is the conventional institution for imposing punishment upon criminally responsible actors, and therefore its dispositions typically perform an expressive function and serve the goals of retribution and deterrence. It is also ordinarily clear that, in contrast, civil commitment is the conventional mechanism for treating the psychologically impaired while protecting the public from danger. Convicted sex offender commitments purport to perform the functions of civil commitment, but, as explained above, they may perform the expressive, retributive, and deterrent functions of punishment. Disturbingly, there are indications that the public's understanding of the ordinary functions of the institutions of punishment and civil commitment is affected by the distortion caused by convicted sex offender commitments. Although the public may prefer that sex offenders be punished rather than treated,[396] there is evidence that citizens—and even the bar—have come to believe that the criminal law is not serving its proper functions, and that they must turn to convicted sex offender commitments to see those functions performed. Consider the implications of the following summary of the testimony given during Crane's sexual predator commitment hearing:

> At the commitment trial, the victim expressed her disappointment in the course Crane's prosecution had taken. The prosecutor drew out her dissatisfaction by asking, "So would it be fair to say that for a crime that this Court gave a 35-to-life sentence to Mr. Crane, he only served a little over four years?" And he followed up on her affirmative response with "[a]nd understandably you're very upset about how the system treated you in this case, right?" "Yes, very," she answered. The victim had been told by the State that the kidnapping charge could not be refiled against Crane on account of a technicality.
>
> In this regard, the prosecutor had suggested to her that obtaining a guilty plea "was the best way to go in order to be able to go down the line" and use the option of the [Sexual Predator] Act. The victim agreed to the plea bargain because she believed "it was the only way to make sure that it didn't end there." The victim testified, "I was not aware that there was an option of going to trial and going through this or agreeing to the plea and then using the

396. This is illustrated by the comments made by Helen Harlow, the mother of the boy who was assaulted by Earl Shriner in Washington, upon her tour of the "ultra-secure Civil Commitment Center" designed to house persons committed under the sexually violent predator law: "I tried to envision Earl Shriner here and decided no, I'd rather have him behind bars . . . . I don't think he deserves this opportunity. It's nicer than prison." Debera Carlton Harrell, *A Place for Potential Predators: Ultra-Secure Center Stems from New Law*, SEATTLE POST-INTELLIGENCER, June 29, 1990, at B2, *available at* 1990 WLNR 1286846.

> Sexual Predator Act. As I was—as I understood, this was the only option, but if we can get a—some kind of a conviction, then we can use this option later down the road to make sure he stays off the street."[397]

Indeed, the Washington task force that generated the original sexual predator commitment procedure viewed its mission as "respond[ing] in a meaningful and responsible way to the public outrage over . . . cases in which violent sex offenders were released to the community only to reoffend."[398] One might reasonably conclude that convicted sex offender commitments were born out of frustration with the perceived inadequacies of the criminal justice system and, to some extent, the institution of civil commitment, and that the true expressive function of this new "civil" institution is not to express condemnation toward the offenders as much as frustration and outrage toward the traditional institutions' handling of sex offenders.

V. CONCLUSION

Historically, states have treated sex offenders as either criminals or psychological deviants depending on whether the prevailing philosophy of the era emphasized punitive or rehabilitative goals. This suggests that there exists an inherent flexibility, or ambiguity, in the way that social institutions might respond to sex offenders. That is, due to the nature of their offenses, it seems appropriate to treat sex offenders either as accountable criminals or as deviants driven by abnormal psychological urges. In the aftermath of heinous sex offenses committed in the State of Washington, a task force devised a new commitment procedure that could be used to secure the civil commitments of convicted sex offenders who were nearing the end of their prison sentences, but who did not suffer from a psychological impairment or manifest dangerousness that would satisfy the state's traditional civil commitment statute. This new procedure represented a marked departure from previous sex offender commitment laws, which generally established alternatives—rather than successors—to criminal proceedings.

Challenges to the controversial commitments authorized under the Washington statute and a similar statute adopted in Kansas have been raised, and courts have reached different conclusions about the civil nature of these commitments and their compatibility with principles of substantive due process. The United States Supreme Court ultimately resolved each of these issues in favor of the constitutionality of the commitments. To resolve the first issue, the Court applied the deferential *Ward* test and determined that the convicted sex offender commitments were indeed civil. In so doing, the Court noted

397. *In re* Crane, 7 P.3d 285, 287 (Kan. 2000).
398. Maleng, *supra* note 35, at 821.

that there was no clear proof that the commitments performed the functions traditionally reserved for punishment—retribution and deterrence—so as to negate the legislature's intention to create a civil statute. The Court resolved the second issue by determining that the psychological impairments used to justify the commitments satisfied substantive due process concerns to the extent that the impairments limit commitments to persons who suffer from volitional impairments that cause "serious difficulty in controlling behavior."

In 2006, Nebraska adopted the Sex Offender Commitment Act, which, like the Washington and Kansas sex offender commitment laws, allows for the civil commitment of convicted sex offenders who do not satisfy the traditional commitment criteria of mental illness and dangerousness. Thus, the Nebraska statute also raises difficult questions about the "civil" nature of these commitments and the nature of the psychological impairments that might justify them. One might argue that the Supreme Court's decisions concerning the constitutionality of the Washington and Kansas statutes apply with equal force to Nebraska's Sex Offender Commitment Act. However, this Article presents and applies an alternate analytical framework that might be used to examine the difficult questions raised by the convicted sex offender commitment statutes in all three states. This framework is based upon the defining expressive function of punishment, or condemnation. Arguably, when condemnation is separated into distinct levels of analysis, a framework emerges that helps distinguish criminal punishment from ordinary civil commitments. The key distinguishing factor under this framework is the expression of condemnation that is directed towards a person when there has been an institutional determination that he was criminally responsible for committing a proscribed act. Criminal sentences express this condemnation, and are therefore punitive, because they are based upon determinations that the defendant was accountable for committing a proscribed act. Civil commitments do not express this condemnation, even when they are imposed in connection with criminal proceedings, because they are not based upon such a determination.

When this framework—and its focus on criminal responsibility—is applied to convicted sex offender commitments, the justificatory problems that inhere in these commitments become salient. Specifically, the framework reveals that the Supreme Court failed to define sufficiently the sort of impairment that could support a finding that the sex offender suffers from a serious difficulty in controlling his behavior that justifies his commitment but does not undermine the determination that he was criminally responsible for his offenses. Since the type of impairment that could perform this function remains ambiguous, it is difficult to determine with certainty whether convicted sex offender commitments are punitive. However, it is arguable that

they do in fact perform the expressive, retributive, and deterrent functions of punishment. At the very least, the mysterious nature of the expressive function of convicted sex offender commitments indicates that the institutions of punishment and civil commitment—and the separate functions that they are meant to perform—have been blurred and distorted in order to ensure that the incapacitation of criminals may continue through civil commitments.